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Supreme Court of the United States

OCTOBER TERM, 1935

No. 636

JAMES WALTER CARTER,
Petitioner,

v.

CARTER COAL COMPANY; GEORGE L. CARTER as Vice-President and a Director of said Company; C. A. HALL as Secretary-Treasurer and a Director of said Company; JOHN A. CALLAHAN, JOSEPH W. GORMAN and WALTER C. DENHAM, as Vice-Presidents of said Company; GUY T. HELVERING, individually and as Commissioner of Internal Revenue of the United States; M. HAMPTON MAGRUDER, individually and as Collector of Internal Revenue of the United States in and for the Collection District of Maryland; CLARENCE C. KEISER, individually and as Acting Chief Field Deputy Collector of Internal Revenue for Division No. 2 of the Collection District of Maryland; JOHN B. COLPOYS, individually and as United States Marshal in and for the District of Columbia; HOMER S. CUMMINGS, individually and as Attorney General of the United States; STANLEY REED, individually and as Acting Attorney General of the United States and as Solicitor General of the United States; and LESLIE C. GARNETT, individually and as United States Attorney in and for the District of Columbia.

BRIEF FOR THE PETITIONER

FREDERICK H. WOOD,
WILLIAM D. WHITNEY,
Counsel for Petitioner.

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Supreme Court of the United States

OCTOBER TERM, 1935

No. 636

JAMES WALTER CARTER, *Petitioner*,

v.

CARTER COAL COMPANY, *et al.*

BRIEF FOR THE PETITIONER

Opinion Below

The opinion of the Supreme Court of the District of Columbia is reported in 63 Washn. Law Reporter 986, and appears in the record at R. 1179-1198.

Jurisdiction

The decree of the Supreme Court of the District of Columbia was entered on December 10, 1935 (R. 216A), and appeal to the United States Court of Appeals for the District of Columbia was allowed upon the same day (R. 216E). The petition for writ of certiorari was filed December 16, 1935 and was granted on December 23, 1935, prior to hearing or submission of the appeal in the Court of Appeals (R. 1200). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 8(b) of that Act (43 Stat. 936, 938-940). *The Three Friends,* 166 U. S. 1, 49; *U. S.* v. *Bankers Trust Co.,* 293 U. S. 548; *Retirement Board* v. *Alton R. Co.,* 295 U. S. 330, 333, 334.

SUMMARY STATEMENT OF CASE

This case brings before the Court for review the validity of an Act commonly known as the Guffey Act,[1] and entitled as follows:

> "To stabilize the bituminous coal-mining industry and promote its interstate commerce; to provide for cooperative marketing of bituminous coal; to levy a tax on bituminous coal and provide for a drawback under certain conditions; to declare the production, distribution, and use of bituminous coal to be affected with a national public interest; to conserve the bituminous coal resources of the United States; to provide for the general welfare, and for other purposes; and providing penalties" (Appendix, p. *2*, fols. 1-2).

As appears from its title, its context, and its legislative history, this Act has for its purpose the subjection of the bituminous coal industry to Federal regulation. This it seeks to accomplish by the imposition of a tax of 15% on the sale price (or fair market value) of *all* bituminous coal produced in the United States, provided, however, that all coal producers who subscribe to and become members of a bituminous coal code, the terms of which are incorporated in the Act, shall be entitled to a drawback or rebate of 90% of the tax so imposed (Sec. 3, Appendix, pp. *6-7*, fols. 18-22).

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[1]Act of August 30, 1935, c. 824, 49 Stat. 991, officially designated as the "Bituminous Coal Conservation Act of 1935". A synopsis of this Act will be found at pp. 10-22, *post*. It is reproduced in full in a separate Appendix filed herewith. Because of the unusual length of the several sections and sub-divisions of the Act, the Appendix carries folios for ready reference to the several parts of the Act. Reference hereinafter to provisions of the Act will carry both the page and folio of the Appendix at which such provision appears, as, *e.g.* "Act, Sec. 5 (b), Appendix, pp. *25-26*, fols. 94-98".

The Code sets up a scheme for Federal regulation of the industry through the machinery created thereby. All producers who become members of the Code surrender to the agencies set up by the Act control over the wages and hours of their employees and the prices to be charged for their coal. Their liberty of action is in other respects restrained (Sec. 4, Appendix, p. 7, fols. 23-24). The Act is, therefore, one in which Congress, under the guise of a penalty imposed in the form of a prohibitive tax, has attempted to compel all producers to submit to its regulatory provisions. It is the contention of the petitioner that neither regulation nor stabilization of the bituminous coal industry is within any of the enumerated powers of Congress but that either or both constitute an invasion of the powers reserved by the Constitution to the States and to the people, and that it is beyond the power of Congress to regulate the hours and wages of miners, or to fix the prices at which coal shall be sold.

The suit was brought in the Supreme Court of the District of Columbia (R. 1-16) by the petitioner, James Walter Carter, a stockholder of Carter Coal Company, to enjoin the Company and its officers and directors from accepting and complying with the Code, and to enjoin the Commissioner and the Collector of Internal Revenue, the Attorney General and the United States Attorney for the District of Columbia, and their assistants and subordinates,[1a] from assessing or collecting from the Company the tax imposed by the Act upon coal producers failing to accept and comply with the

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[1a]Reference herein to "the respondents," "the defendants," or "the Government" is to these Government officers defendants, *i.e.*, Guy T. Helvering, *et al.*

Code, and from otherwise attempting to enforce such tax (R. 14-16).

Carter Coal Company is a Delaware corporation engaged in the production of coal in West Virginia and Virginia (FF.[2], R. 112; FF. 18, R. 119). The petitioner is its President and a large minority stockholder (FF. 1, R. 111). Prior to the institution of this suit, petitioner, as such stockholder, made formal demand upon the Board of Directors to refrain from joining the Code, to refuse to pay the tax imposed by the Act, and to take appropriate legal steps to determine the constitutionality of the Act and its liabilities thereunder, and protect the rights of the Company and its shareholders (R. 7-8; FF. 15, R. 117-118; R. 619). The ground of this demand was that the statute and Code are unconstitutional; that by accepting and complying with the Code the Company and its Board of Directors would surrender the constitutional and property rights of the Company and of its shareholders and also the vital right of the Company and its directors to manage its business, particularly with respect to the all-important matters of wages and prices; that in so doing the Company would be acting *ultra vires* and the directors would be violating their statutory duties under the laws of Delaware; that adherence to the Code would be destructive of the business of the Company; and that payment of the tax would constitute a waste and misappropriation of assets (R. 7; R. 619).

On consideration of this demand, the Board, by majority vote, resolved that the Company should "accept and obligate itself to comply with the Code" (R. 8; R. 623-624), and this resolution was confirmed by like majority vote at a shareholders' meeting called to consider the resolution

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[2]The symbol "FF" refers to the findings of fact of the trial court (R. 111-212).

and petitioner's demand (R. 9; FF. 15, R. 117-118; R. 627-629). The court below has found that "the plaintiff seriously endeavored to persuade the majority stockholders and a majority of the Board of Directors to contest the validity of the Act and to refuse to join the Code, and he did all that a reasonable and prudent man, under the circumstances, should have done to secure action favorable to his views by the Board, by the stockholders and by the Corporation". (FF. 15, R. 118).

The sole reason for this action by the Board and shareholders, as shown by the minutes of the meetings (R. 8-9, 620-629) and all other evidence of record (R. 250), was thus found by the court below:

> "The view of said controlling stockholders and of a majority of the board of directors is that the statute is unconstitutional and is economically unsound, and that it would adversely affect the business of the Company and the interest of its shareholders for the Company to accept and comply with the Code, but that nevertheless the Company must accept the Code because of the tax on its gross sales applicable upon its failure to accept the same which the majority are of the opinion would result in serious damage to the Company and might result in its bankruptcy" (FF. 15, R. 117-118).

The court found and concluded, both as matter of fact and of law, that "There exists a genuine dispute between the plaintiff and the controlling stockholders of the Company" (FF. 15, R. 117); that "This proceeding is brought in good faith" (FF. 15, R. 118); and that "This cause involves a substantial adverse controversy arising under the Constitution and laws of the United States" (Conclusion 1, R. 213; FF. 167, R. 208).

The evidence established, and the court below ruled, that the exaction of the penalty tax would quickly drive the Company out of business (R. 128, 129), while acceptance of the Code would seriously affect its rights (R. 208, 125-128), and, in the view of all concerned, would seriously damage the Company and might result in its bankruptcy (R. 117-118). The petitioner, a large stockholder, obviously has no remedy whatever other than in this stockholder's suit brought in his own right and as a derivative suit to enjoin his Company and its officers from taking the threatened action, and also brought in his own right and as a derivative suit to enjoin the Government officer defendants from enforcing the penalty tax under color of a statute challenged as unconstitutional;[3] and the court below so ruled (R. 213).

As in the *Schechter* case,[4] the Government took the position that whether the statute was within the Commerce Clause was to be determined from a consideration of the "economic facts." Accordingly a large amount of evidence was introduced by the Government, which assumed the burden on this issue, or supposed issue, for the avowed purpose of bringing the Act within the provisions of the Commerce Clause. At this point it is sufficient to say that the evidence[5] failed to disclose:

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[3]As in *Hill* v. *Wallace*, 259 U. S. 44; *Smyth* v. *Ames*, 169 U. S. 466; *Ex parte Young*, 209 U. S. 123; *Dodge* v. *Woolsey*, 18 How. 331; *Heisler* v. *Thomas Colliery Co.*, 260 U. S. 245, 253; and *Chicago* v. *Mills*, 204 U. S. 321, in all of which jurisdiction on a stockholder's bill was sustained both to enjoin the corporation from complying with, and to enjoin the Federal or State officers from enforcing, the unconstitutional statute.

[4]*Schechter Corp.* v. *United States*, 295 U. S. 495, 512.

[5]For detailed outline and review of evidence, see pp. 22-27 and 28-62, *post*.

(1) The existence of any monopolistic control or artificial restraint upon free competition requiring the intervention of governmental authority, either State or Federal, for the purpose of insuring to the public an adequate supply of coal at reasonably low prices.[6]

(2) Any national shortage of coal since the elimination in 1923 of the railway car shortage (FF. 92, R. 159; FF. 110, R. 170; R. 456; R. 330).

(3) Any restraint[7] whatsoever upon either the free play of competition or the free movement of coal in interstate commerce.[8]

(4) Any obstructions to or interruptions of the movement of coal in interstate commerce[9] during a period of more than ten years, except to the extent that occasional strikes have at times prevented movement of coal from the individual mines at which they occurred.[10]

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[6]On the contrary, the evidence and the evidentiary findings of fact disclose that there exists and has existed over a period of many years the keenest competition and rivalry among coal producers, resulting in prices as to which the complaint is that they are insufficient to return an adequate profit to the operators. (FF. 96, R. 161; FF. 153, R. 200; Defs. Exs. 3, 3A, R. 1002-1003; R. 382, 386; FF. 178-179, R. 210; also see Govt. answer, R. 36).

[7]See also Point II at pp. 103-112 *post*.

[8]On the contrary, the complaint is that competition is too free and the amount of coal produced or capable of production from existing mines is, and has been for many years, in excess of demand. (Govt. ans., R. 36; FF. 57, R. 137; R. 326; R. 476; and see preceding footnote.)

[9]See footnote 7, *ante*.

[10]It appears from the evidence and from the findings of the Court, however, that for a thirty-five year period* from 1899 to 1933 there had been an average per year of but eleven days idle time per man employed on account of labor disputes, and from 1923 to 1933, an eleven year period*, an average of but nine days idle time on this

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*Periods identified by Government witnesses as appropriate test periods.

(5) Any wide fluctuations in the price of coal for a period of more than ten years, although during that period (except for the NRA era) there has been a gradual decline therein (FF. 96-98, R. 161-162; R. 318; Def. Ex. 3-3A, R. 1002-1003).

The evidence did disclose:

[1] A shifting and reshifting of tonnage, as among the several sources of supply, in the strife for business, referred to by the Government in its Answer (as amended at the close of the trial), and by the court in its Findings, as "diversions and dislocations" (R. 105, FF. 70-74, R. 144-145; FF. 110, R. 170; FF. 119-123A, R. 179-183). This, of course, is to be expected in any industry free from monopolistic control or artificial restraint, and where competition has free play. These so-called diversions or dislocations made themselves manifest chiefly in the rivalry between the Northern and

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account (Def. Ex. 4A, R. 1006). But, that time so "lost" is not a factor which actually affects aggregate production and interstate shipment to any material degree was evidenced by the fact that total days lost on account of seasonal demand and causes other than labor disputes averaged 93 days per annum during the thirty-five year period and 114 days during the eleven year period, with a result that days lost on account of strikes were in effect recouped by working on days that otherwise would have been lost for other reasons (FF. 57-58, R. 137-138). For instance, the only serious strike which has occurred in the last ten years occurred in 1927 (Pl. Ex. 66, R. 937-939; Pl. Exs. 80-80A, R. 965-966A). This strike was not nationwide, and but 45 days of idle time were attributable thereto, while during the same year the total number of days lost was 117, and the number of days worked actually exceeded the average of the eleven-year period by six (Def. Ex. 4A, R. 1006; Pl. Ex. 76, R. 955). It also appears that these strikes caused no national shortage of the coal supply, but resulted only in a diversion of tonnage from the mines affected to those unaffected (FF. 110, R. 170; R. 456; R. 330).

Southern mines[11] for business in common consuming markets (FF. 119-123a, R. 179-183) and have resulted in a gradual increase in the proportion of the business handled by the latter (FF. 70-74, R. 144-145).

[2] That wages represent 60-65% of the cost of mining coal and practically the only controllable item of such cost (FF. 64, R. 140; R. 272; R. 441-442), although not the only controllable item in costs of coal as delivered, of which freight rates (already in large part subject to Federal control) represent more than 50% (FF. 63a, R. 140).

[3] That the industry by reason of its over-expansion has been unprofitable for a long period of time, and that higher prices would be to the advantage of operators and miners alike (FF. 102, R. 165; Def. Ex. 6A, R. 1011; FF. 148-151, R. 198-199) although, perhaps, only temporarily (FF. 53-55, R. 134-136; FF. 63, R. 139; R. 260-261; Pl. Exs. 20-34, R. 816C-866).

The court below, at the conclusion of the case, dismissed the bill (R. 216A-216B), holding the price fixing provisions of the Act and Code valid, and the wage, hours and collective bargaining provisions invalid, but separable (R. 213-215, 1179, *et seq.*). At the same time it enjoined the Government officer defendants from assessing, collecting, or attempting to collect a tax for the period intervening

[11]The Government identified Virginia, West Virginia and Kentucky as leading "Southern" fields, and Pennsylvania, Ohio, Indiana and Illinois as leading "Northern" fields. See, for example, Findings of Fact Nos. 70-74, R. 144-146; 113-125, R. 173-185; and Defendants' Exhibits 25, 26, R. 1067-1068; 30A, R. 1076; 31A, 32, 33 and 34, R. 1078-1080. Other large fields, such as Alabama in the South, were not regarded as coming within this principal sphere of competition.

between the institution of the suit and the entry of final decree in the trial court, and granted a stay as to future taxes pending appeal (R. 216B-216E).

The petitioner Carter appealed to the United States Court of Appeals for the District of Columbia from the decree dismissing the bill, and the Government officer defendants appealed from so much of the decree as enjoined the collection of the tax up to the date of the decree.

The case is now here on writs of certiorari granted on petitions of this petitioner and of the Government officer defendants, prior to argument or submission of the appeals in the Court of Appeals.

SYNOPSIS OF THE STATUTE

1. Declaration of Policy.

The opening section of the Act contains the familiar "declaration of policy" constituting an "introduction of the Act" in "broad outline"[1] (Appendix, pp. *2-3,* fols. 2-7). It is enough to say at this point that this Section demonstrates clearly that the statute is regulatory in purpose, and that it was not enacted as a revenue measure or as a regulation of interstate commerce but has the purpose of regulating the bituminous coal industry,[2] including production, in the national interest and for the promotion of

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[1]See *Panama Refining Co.* v. *Ryan,* 293 U. S. 388, 416, 418.

[2]The scope of the Act does not include all coal produced, being limited specifically to *bituminous* coal, and thus excluding *anthracite* coal, although anthracite is consumed and competes to some degree with bituminous coal in Nebraska, Kansas, Iowa, Missouri, Illinois, Indiana, Michigan, Ohio, Maryland, District of Columbia, Delaware, Pennsylvania, New Jersey, New York, Connecticut, Rhode Island, Massachusetts, Vermont, New Hampshire, Maine and also the Lake ports (FF. 53, R. 134-135; R. 260-261; R. 864A-865).

the general welfare, and also the purpose, among others, of placing wages, hours, and labor relations in the industry under Federal control.

2. Creation of a National Bituminous Coal Commission.

Sec. 2 provides for the creation of a National Bituminous Coal Commission (hereinafter referred to as "the Commission"), whose powers and duties are elsewhere defined in the Act, and contains certain other provisions not material to this case (Appendix, pp. *3-6*, fols. 8-18).

3. The Penalty Tax.

Sec. 3 of the Act imposes

> "upon the sale or other disposal of all bituminous coal produced within the United States an excise tax of 15 per centum on the sale price at the mine, or in the case of captive coal the fair market value of such coal at the mine, * * * and to be payable monthly for each calendar month, * * * *Provided further*,[3] That any such coal producer who has filed with the National Bituminous Coal Commission his acceptance of the code provided for in section 4 of this Act, and who acts in compliance with the provisions of such code, shall be entitled to a drawback in the form of a credit upon the amount of such tax payable hereunder, equivalent to 90 per centum of the amount of such tax, to be allowed and deducted therefrom at the time settlement therefor is required, in such manner as shall be prescribed by the Commissioner of Internal Revenue * * *" (Appendix, pp. *6-7*, fols. 18-22).

[3]So in original. Hereafter, in this brief, all italics in quotations are petitioner's unless otherwise indicated.

Under this Section, in effect, all bituminous coal producers who assent to and comply with the regulatory features of the Act and of the Code pay a tax of 1½%, while producers failing to accept and comply therewith pay a tax of 15%, being thus penalized to the extent of 13½%. This "penalty" tax is applicable to all bituminous coal produced, whether transported and consumed wholly within the limits of the State of production or outside thereof,[4] including "captive coal".

By "captive coal" is meant coal consumed by the producer itself either at the mine or after being transported to place of use (Act, Sec. 19, Appendix, pp. *36-37,* fols. 140-141). There are many mines in the United States producing a substantial tonnage, owned by steel companies, other industrial concerns, and railroads, the product of which is consumed in the manufacturing or other operations of such producers (FF. 63, R. 139). These producers of "captive coal" are not engaged in commerce in coal in any sense, but in the production of coal for their own use. Since they do not sell coal, the purpose of subjecting them to the penalty tax could not have been to impose upon them the price-fixing provisions of the Act, but obviously was to subject the wages and hours of their employees and their labor relations to the Federal control embodied in the labor provisions of the Act. Captive coal was represented by 50,000,000 out of 358,000,000 tons produced in the United States in 1934 (*Hearings before a Sub-Committee of the Committee on Ways and Means,* House of

[4]The evidence shows that in the test year, 1929, not more than 58% of the coal was sold for delivery in States outside the State of production, and at least 42% for delivery in the State of production (Def. Ex. 14, R. 1019; Pl. Ex. 67, R. 940; and see discussion, *post,* pp. 41-42).

Representatives, 74th Congress, 1st Session, on H. R. 8479, at p. 152).

The obvious purpose of the tax provision, therefore, is to subject all producers of bituminous coal in the United States to the regulatory features of the Act, whether engaged in commerce or not, and whether coal produced by them moves in interstate commerce or not.

4. Regulatory Provisions—the Bituminous Coal Code.

The regulatory features of the Act are contained in Sec. 4, which the Commission is directed to formulate into a "Bituminous Coal Code"[5].

The Act provides for the division of the coal areas of the United States into twenty-three districts[6] (Sec. 4, Part I(a), Appendix, p. *7*, fol. *24*; Annex to Act—Schedule of Districts, Appendix, pp. *37-43*, fols. 144-168), which are grouped into nine minimum price areas (Sec. 4, Part II(a), Appendix, pp. *11-12*, fols. 40-43).

Within each district a "district board" is established, to be selected, in the manner provided in the statute, by the producers of the district, except that one member "of each district board shall be selected by the organization of employees representing the preponderant number of employees

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[5]The Code as formulated by the Act is in itself complete, and apparently the Coal Commission is vested with no discretion or power to make any changes therein. This Code was formulated and promulgated by the Commission on October 9, 1935. As so promulgated, it is substantially in *haec verba* with Sec. 4 of the Act, changes being only those appropriate for its transition from a section of the statute to a Code. The Code appears in full in the record at R. 58-76. All Code members are required to comply with its provisions as a condition precedent to obtaining the drawback provided for in Sec. 3 of the Act (Appendix, pp. *6-7*, fols. 18-22.)

[6]Thirteen of the twenty-three districts are entirely within a single area, *i.e.*, Minimum Price Area No. 1, and fifteen are situated wholly within State lines.

in the district in question" (Sec. 4, Part I(a), Appendix, p. *8*, fol. *27*).

4a. Minimum Prices.

Elaborate provision is made for the determination of minimum prices (Sec. 4, Part II(a) and (b), Appendix, pp. *10-16*, fols. 35-37) and all Code members are forbidden to sell coal below the minimum price fixed for such members, subject to certain exceptions immaterial to the fundamental questions presented (Sec. 4, Part II(e), Appendix, p. *17*, fol. 61). The power to determine minimum prices for each mine in the district is conferred, in the first instance, upon the district board, subject to approval or modification by the Commission and subject to coordination with the minimum prices fixed in other districts as provided for in Sec. 4, Part II(b) (Appendix, pp. *14-16*, fols. 51-57). The governing provision for the determination of minimum prices is to be found in the third paragraph of Sec. 4, Part II(a), and is as follows:

> "Each district board *shall*, from time to time on its own motion or when directed by the Commission, establish minimum prices free on board transportation facilities at the mines for kinds, qualities, and sizes of coal produced in said district, *with full authority*, in establishing such minimum prices, to make such classification of coals and price variations *as to mines* and *consuming market areas* as it may deem necessary and proper. *In order to sustain the stabilization of wages, working conditions, and maximum hours of labor*, said prices *shall* be established so as to yield a return per net ton for each district in a minimum price area, as such districts are identified and such area is defined in the subjoined table designated 'Minimum-price area

table', equal as nearly as may be to the weighted average of the total costs, per net ton, determined as hereinafter provided, of the tonnage of such minimum price area." (Appendix, p. *11*, fols. 37-39).

All that follows may be properly regarded as the machinery by which the objects sought to be attained by this provision are to be accomplished, together with provision for review by the Commission of the prices fixed by the district boards. It will be observed that by this provision district boards are not only empowered, but required, to establish minimum prices for *each mine,* with full authority within their discretion to make such classification of coals and to provide for such price variations at the several mines as the board *may deem necessary and proper.* The extent of the discretionary power thus vested in the board will be better understood when it is stated that it appears by the evidence that there were recognized under the N.R.A. over 27,000 sizes, varieties and prices of coals in what roughly corresponds to Minimum Price Area No. 1, and possibly 40,000 in the entire United States (R. 266, 268), and that the number of mines in 1930 was 5,891 (FF. 93, R. 160). Each district board (subject to the provision for "coordination" to be hereinafter reviewed, and subject to review by the Commission) is thus empowered to fix, mine by mine, the minimum price at which every producer within the district may sell the several classes of coal which he mines, and to classify the several kinds and grades of coal which he mines, and to put such classification upon such coals as it, within its discretion, deems proper.

It will also be observed that the express purpose of the minimum price provisions is "in order to sustain the stabilization of working conditions and maximum hours of

labor" which, in turn, are to be fixed in accordance with the labor provisions of the Code contained in Sec. 4 of the Act, Part III(e) (Appendix, pp. *23-24,* fols. 88-89; and see discussion, pp. 82-90, *post*).

For the purpose of accomplishing the object set forth in the foregoing provision of the Act, each district board is required to ascertain the weighted average cost of coal produced within its district and report it to the Commission, which, upon the basis of such reports, shall determine the weighted average of the total costs of each minimum price area, the latter to be taken "as the basis for the establishment of minimum prices to be effective until changed by the Commission" (Sec. 4, Part II(a), Appendix, pp. *13-14,* fols. 46-49). This having been done, the district boards are then directed "under rules and regulations established by the Commission" to "coordinate in common consuming market areas upon a fair competitive basis, the minimum prices" in each district embraced in a given minimum price area, to the end that they may not be "unduly prejudicial or preferential, as between and among districts" (not among mines, it will be observed) for the purpose "of affording the producers in the several districts substantially the same opportunity to dispose of their coals upon a competitive basis as has heretofore existed". Prices so coordinated are subject to review by the Commission (Sec. 4, Part II(b) and (d), Appendix, p. *15,* fols. 54-55, p. *16* fols. 59-60).

The provisions of the Act in respect of the standards and manner in which such prices are to be coordinated, as compared with the simple mathematical calculation of weighted average costs to be made as the first step, are so indefinite and complicated as to defy rational explanation.

The purpose of the minimum price provisions, however, is plain. It is to confer upon the price-fixing agencies of the Act (the district boards and the Commission) power to fix minimum prices for every kind of coal produced at every mine in the United States at such levels as may be necessary to stabilize wages, hours, and working conditions (as determined under the labor provisions of the Code), and with the hope that the aggregate of such minimum prices so fixed, class by class, and mine by mine, may approximate for each minimum price area the aggregate cost of producing coal within such area, at the same time preserving to each district that proportion theretofore enjoyed by it of the total coal moving into consuming areas in competition with other districts. If, under the complicated and indefinite provisions of the statute, the goal sought is attained, the effect is to freeze the production and distribution of coal and to limit the output of each mine to that which it has heretofore produced and sold.

The accomplishment of such a result would seem to be humanly impossible.[7] Certain it is that any error of judgment or exercise of favoritism in the process of coordinating prices must inevitably increase or decrease the output

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[7]The extreme complexity, and almost certain injustice, which must accompany the effort to adjust all prices in Minimum Price Area No. 1 by treating all districts on the basis of the weighted average of the whole area, is shown by the figures in the record evidencing the great variation between districts in the average prices at the mine. Thus, the following different average values per net ton f. o. b. mine are given for 1932 (Def. Ex. 46):

Pennsylvania, eastern	$1.42	Southern low volatile	$1.16
Pennsylvania, western	1.28	Southern high volatile	1.07
Ohio	1.11	Kentucky, western	.84
West Virginia, Panhandle	1.10	Illinois	1.53
Michigan	2.75	Indiana	1.30
West Virginia, northern	.86	Iowa	2.40

and sale of coal from a particular mine, according to whether or not, in such coordinating process, the price fixed for that particular mine bears its proper mathematical relation to the prices fixed at other competing mines.

But, whether the elaborate price fixing machinery be workable or capable of producing the desired result or not, one thing is plain, and that is that the price fixing agencies set up by the Act are invested with the power to determine the output and sale of coal at every mine in the United States, since it is obvious that the ability of each mine to produce depends upon its ability to sell in competition with the minimum prices fixed for competing mines. The ultimate result of the price fixing provisions is therefore not only to deprive every mine owner of the right to fix his own prices but, in addition, to control the production of coal at his mine, primarily, as appears from the statute itself, for the purpose of stabilizing hours, wages and working conditions, these to be determined, in turn, in the manner provided by the labor provisions of the Act, and the observance of them to be obligatory upon every producer.

4b. Maximum Prices.

The Commission is also empowered to fix maximum prices[8] (Sec. 4, Part II (c), Appendix, p. *16,* fols. 57-58).

4c: Other provisions relating to prices.

No coal may be sold below the minimum or above the maximum fixed in accordance with the statute, and "All

[8]Generally, because of the excess capacity in the industry, the minimum prices fixed pursuant to the Code will likewise be the maximum prices obtainable (FF. 57-58, R. 137-138; R. 261-262; R. 388).

sales and contracts for the sale of coal shall be subject to the code prices" (Sec. 4, Part II (h), Appendix, p. *18,* fols. 67-68). Appropriate provisions are made against Code members entering into new contracts inconsistent with the Code, with exemptions for sales into foreign markets,[9] and provisions to guard against evasion, etc. (Sec. 4, Part II (e), (f), (g) and (h), Appendix, pp. *17-18,* fols. 61-68). Certain practices inconsistent with the maintenance of an established price are declared to be unfair methods of competition and are forbidden[10] (Act. Sec. 4, Part II (i), Appendix, pp. *18-21,* fols. 68-79).

4d. Labor provisions.

Sec. 4, Part III (Appendix, pp. *22-25,* fols. 81-93) provides that to effectuate the purposes of the Code the district boards and the Code members shall accept the following conditions:

(1) The right of employees to bargain collectively through representatives of their own choosing, and prohibition upon joining a company union as a condition of employment (Sec. 4, Part III(a), Appendix, p. *22,* fol. 82).

(2) The right of employees to peaceable assemblage and the selection of their own check-weighmen, with further provision that they shall not be required, as a condition of employment, to live in company houses or trade in

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[9]Shipments to Canada and car-ferry shipments to Cuba are included in the statutory definition of the term "domestic market" to which the Act applies. (Act, Sec. 4, Part II (e), Appendix, p. *17,* fol. 64). See discussion pp. 167-174, 175, *post,* of the constitutional provision forbidding the United States to impose any duty in respect of foreign exports.

[10]The same provisions were contained in the N. R. A. Bituminous Coal Code in aid of the price fixing provisions of that instrument (Art. VI, R. 885-888).

company stores (Sec. 4, Part III (b), Appendix, p. *22,* fol. 83).

(3) Subjection to the jurisdiction of a Bituminous Coal Labor Board created by the statute (Sec. 4, Part III(c), Appendix, pp. *22-23,* fols. 84-86), with authority to adjudicate disputes arising under subsections (a) and (b) of Part III, to determine employee representation, including the power to hold elections for the purpose, and to order Code members to meet labor representatives for the purposes of collective bargaining (Sec. 4, Part III(e), Appendix, pp. *23-24,* fols. 88-89). The Labor Board is required to transmit its findings and orders to the parties interested and to the Commission (Sec. 4, Part III(d), Appendix, p. *23,* fols. 87-88), which is required to accept as conclusive such findings and orders and, upon complaint of violation thereof, to inquire only into the compliance or non-compliance of the Code member with respect thereto. If it finds such member has failed to comply with any order of the Labor Board (see Sec. 5, subparagraph (b), Appendix, pp. *25-26,* fols. 94-98), his membership shall be revoked, thus subjecting such member to the immediate payment of the penalty tax.

(4) The provisions of the statute governing the determination of wages and hours of labor are as follows:

> "(g) Whenever the maximum daily and weekly hours of labor are agreed upon in any contract or contracts negotiated between the producers of more than two-thirds the annual national tonnage production for the preceding calendar year and the representatives of more than one-half the mine workers employed, such maximum hours of labor shall be accepted by all the code members. The wage agree-

> ment or agreements negotiated by collective bargaining in any district or group of two or more districts, between representatives of producers of more than two-thirds of the annual tonnage production of such district or each of such districts in a contracting group during the preceding calendar year, and representatives of the majority of the mine workers therein, shall be filed with the Labor Board and shall be accepted as the minimum wages for the various classifications of labor by the code members operating in such district or group of districts" (Appendix, pp. *24-25,* fols. 91-93).

The effect of these provisions is to require every coal producer in the United States to observe hours of labor agreed upon in any contract negotiated between producers of more than two-thirds of the tonnage and representatives of more than one-half of the mine workers employed within the United States, and to observe wages negotiated "by collective bargaining" (in accordance with requirements of preceding provisions of the Act and subject to the jurisdiction of the Labor Board) between representatives of more than two-thirds of the tonnage in his district, and representatives of a majority of the mine workers therein.

The statute thus denies to any individual employer the right to bargain collectively, or otherwise, with his own men and delegates to the designated proportions of producers and miners specified in the Act the power to fix wages and hours for all mines and all miners.

5. Revocation of Code Membership.

The membership of any Code member violating any of its provisions, including any order of the Labor Board, may be revoked by the Commission after hearing (Sec.

5(b), Appendix, pp. *25-26,* fols. 94-98), and no such person may thereafter be restored to membership except upon payment of all taxes in full for the period covered by his violation[11] (Sec. 5(c), Appendix, p. *26,* fols. 98-99).

6. Treble Damages.

Any Code member injured in his business by another Code member, by reason of any violation of the Code, may recover treble damages (Sec. 5(d), Appendix, p. *26,* fol. 100).

7. Review and Enforcement of Commission and Board Orders.

Provision is made for the review and enforcement of the orders of the Commission and the Labor Board (Sec. 6(b) and (c), Appendix, pp. *27-29,* fols. 102-112).

8. Miscellaneous Provisions.

Secs. 7 to 23 contain certain miscellaneous provisions without material bearing upon the constitutional issue presented (Appendix, p. *30 et seq.*).

OUTLINE OF THE EVIDENCE PRESENTED BY THE GOVERNMENT ON "ECONOMIC FACTS."

The plaintiff from the beginning took the position that the statute was unconstitutional on its face, and that ac-

[11]The drawback may be availed of only by a producer who both accepts and "acts in compliance" with the Code (Sec. 3, Appendix, pp. *6-7,* fols. 18-22). Hence failure to comply with the Code subjects a Code member to payment of the full tax, whether his membership be revoked or not.

cordingly the only purpose of a trial would be to establish the jurisdiction of the court and the right of the plaintiff to injunctive relief.

The Government, however, took the position that, in order to sustain the constitutionality of the statute, it would be necessary for it to introduce evidence showing the conditions in the coal industry with a view to establishing that this scheme of regulation (1) was valid under the commerce clause, and (2) did not involve a denial of due process of law.[1]

On the due process clause, the evidence was designed primarily to show depressed working and living conditions at the mines, calling for governmental protection of the miners as an act promotive of social well-being and accordingly of general welfare, and that the improvement of these conditions could be accomplished through Federal enforcement of collective bargaining.

The evidence relating to the commerce clause divides into two parts: (a) evidence to show the volume of coal moving in interstate commerce, and (b) evidence attempting to show that there have existed obstructions and interruptions to interstate commerce in bituminous coal.

These were designed to sustain the regulatory provisions of the statute (a) on the theory that the production, as well as the sales, of coal are themselves largely acts *in* interstate commerce, and (b) on the alternative theory that wages of miners, and the prices of coal at the mouth of the mines, if not *in* interstate commerce, so affect interstate commerce as to permit of Federal regulation.[2]

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[1]The Government submitted a memorandum (R. 47, 48) stating that the constitutionality of the statute "depends upon" such evidence. The memorandum is quoted *post*, p. 28.

[2]For the distinction between the two theories, see *Schechter Corp. v. United States*, 295 U. S. 495, at pp. 542, 544.

The evidence on the issue whether sales of coal are predominantly *in* interstate commerce showed that for the test year 1929 at least 42% in value of the sales called for shipment to purchasers within the State of production. Practically all sales by producers were on an f.o.b. mines basis, delivery being made at the mouth of the mine.

The argument that commerce in bituminous coal was so universally interstate in character as to confer upon the Congress a sweeping power to regulate accordingly broke down, and the burden of the evidence on the facts therefore revolved around the nature and extent of the effect on interstate commerce of the alleged evils in the coal industry attempted to be cured by this Act. This presented two problems:

> (1) What are the principal characteristics in the coal industry which the statute was designed to change?
>
> (2) To what extent, if any, did those characteristics directly affect the interstate movement of coal?

The facts upon which answers to these questions must be based are not seriously in dispute between the parties. Referring to them in order:

(1a) The ills of the coal industry.

It is recognized that the outstanding characteristic of the coal industry, looked upon as a whole, in the last twelve years has been intense competition,[3] resulting *from* excess

[3]The general characteristics of the industry, as shown on this record, do not differ materially from those outlined in the Court's opinion in *Appalachian Coals, Inc.* v. *U. S.*, 288 U. S. 344, at pp. 361 *et seq.*

productive capacity, and resulting *in* reduction (a) of prices to a level slightly below average cost, and (b) of wages to a level below that prevailing during and shortly after the World War.[4]

(1b) Their attempted cure.

Obviously, if excess productive capacity and consequent intense competition be evils, a sovereign having constitutional power to attempt their cure would proceed by limiting production. On the other hand, if the Legislature were more interested in the effect than in the cause, it would attempt directly to regulate wages, hours and prices. This statute chooses the latter alternative.

(2) Their effect upon interstate commerce.

The effect upon commerce of the lowering of prices and wages consequent upon the existence of free and untrammeled competition, has, of course, *not* been to *decrease* the volume of interstate movement of coal.

The Government's proof, therefore, was designed to show, not general decrease in the volume of commerce in coal, but "interruptions" thereof. The ultimate issue of fact (if one existed at all) was as to whether there were any interruptions of commerce, and if so, what. The evidence developed along three lines:

(1) That, principally because Southern[5] producers were non union and hence were not tied to

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[4]Detailed record references (to evidentiary findings, testimony and documents) will be found under the more detailed "Review of the Evidence presented by the Government on 'Economic Facts.'" *post*, pp. 28-62. We are here presenting a broad outline only.

[5]See footnote 11 on page 9, *ante*.

definite wage rates[6] such as were fixed in the North by collective bargaining, Southern coal fields have increased their share of the national market, and the share of the Northern coal fields has correspondingly decreased.[7] This was the Government's evidence of "dislocation".

(2) That there were labor disputes[8] from time to time, the evidence showing, however, that the average days lost in strikes per man employed in the industry over the ten-year period 1924-1933 was only between 9 and 10 days per man per year,[9] and in addition that *at no time since 1922 have consumers in the United States been forced to go without coal as a result of strikes.*[10]

(3) Finally, the Government sought to show violent price fluctuations for coal. The evidence was that, although there were fluctuations during the war and immediate post-war eras, *there has been no serious fluctuation in prices since 1922.*[11]

Accordingly, it became evident that the Government's theory that there were constant and recurrent interruptions of interstate commerce could not be supported on the facts.

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[6]Reductions in wage rates do not result in smaller wages where more hours of employment are afforded through increase of business secured thereby. Reductions in the southern fields have usually been in wage rates, not in wages (FF. 114-115, R. 175-176).

[7]See pp. 37-40, *post*.

[8]As pointed out above (footnote 2, p. 10) the Act does not regulate the production of anthracite. These strike statistics accordingly do not take into account labor difficulties in the anthracite industry.

[9]See footnote 10, p. 7, *ante*.

[10]See pp. 32-35, *post*.

[11]See pp. 35-36, *post*.

The opinion of the court (R. 1178-1198) makes no mention at all of the presence or absence of direct effect on interstate commerce. Delivered as it was at the conclusion of the trial, it faithfully reflects the impression made upon the court by the evidence taken. It deals principally with factors relevant to due process, but, in so far as the interstate commerce power is concerned, proceeds broadly on the simple assumption that there is a "national commerce" in coal, and that the Congress has the inherent power to regulate it.

Thereafter,[12] evidentiary and ultimate findings of fact were signed. The ultimate findings contain several broad statements, in the nature of conclusions, that there have been direct burdens and restraints on interstate commerce in bituminous coal.[13] However, not merely are those ultimate findings (all of which were excepted to, R. 239) inconsistent with the theory of the opinion and on their face based upon an erroneous conception of law as to what constitutes a burden or restraint (see pp. 103-112, *post*), but they find no substantial support either in the evidence or in the evidentiary findings, and there is abundant evidence in the record (exclusively from official Government documents and Government witnesses) establishing the contrary beyond dispute.

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[12]The opinion was rendered November 27 (R. 1179). The findings of fact were signed December 10 (R. 215).

[13]FF. 180, 181, 182, 184, R. 210-211.

REVIEW OF THE EVIDENCE PRESENTED BY THE GOVERNMENT ON "ECONOMIC FACTS" AND OF THE RELEVANT EVIDENTIARY FINDINGS.

1. The Government Answer: Affirmative Defense in Respect of the Commerce Clause.

The great bulk of the evidence at the trial was taken under that part of the Government answer headed "II", relating to interstate commerce (R. 33-37).

The theory of this defense was summarized by the Government in its memorandum submitted in opposition to the request by the plaintiff for the setting of a trial date prior to November 1, 1935 (R. 47, 48):

> "In the view of these defendants the constitutionality of said Act depends upon the existence of the burdens, dislocations, restraints and interruptions to interstate commerce in bituminous coal specified in the separate defense set up in sub-division II of defendant's answer and upon the facts relative to the causes and effects thereof, as therein set forth, and also upon facts relative to the reasonableness under the due process clause of the Fifth Amendment of the regulatory provisions of the proposed coal code."

Passing over the reference to due process (an issue which arises only if the statute be otherwise valid under the commerce clause), this memorandum disclosed an intention to base the argument for validity of the statute upon the facts relative to the causes and effects of alleged restraints to interstate commerce. Under this theory, the issue of fact (if any) was as to the nature and extent of those restraints. The restraints specified were (Answer, R. 34): (a) "sudden unforeseeable, recurrent and prolonged inter-

ruptions and stoppages in the shipment of such coal from the producing areas to the consuming markets"; (b) "sudden, recurrent and extremely wide fluctuations in the price of such coal to the consuming public, resulting in hardship and inconvenience to the consuming public in other States than the State of production, and tending directly and substantially to restrict and control the movement of coal in interstate commerce"; and (c) "unfair and demoralized methods of competition throughout the industry which operate directly and substantially to burden and restrain interstate commerce in bituminous coal".

No testimony was taken as to the alleged unfair and demoralized methods of competition (sub-paragraph (c)); but this was disposed of by a stipulated finding in substance that unfair trade practices, although they exist throughout the bituminous coal industry, are not and have not been engaged in by reputable firms, and are not and have not been the *general practice*, and finally, that similar practices exist in other industries (FF. 166, R. 207). Moreover, no question is here presented as to whether the fair trade practice provisions of the Code (Statute, Sec. 4, Part II (i), Appendix, pp. *18-21*, fols. 68-79; Code, Part II, Sec. 12, R. 67) would be valid if enacted alone and apart from wage and price-fixing provisions. If confined to unfair practices in interstate commerce, a prohibition of them would bear an obvious resemblance to the Federal Trade Commission Act. On the other hand, it seems equally obvious that, if the wage or price-fixing provisions of the Code be unlawful, the entire Code cannot be sustained as valid (and the compulsive tax be likewise sustained) because these fair trade practice provisions would have been valid if enacted alone. In the first place they are only an

insignificant part of the whole Code, and in the second place, they are designed primarily for the purpose of enforcing the price fixing provisions, without which they would be useless. Accordingly, the question of their validity, if standing alone, will receive no independent consideration in this brief.

The two principal issues of fact to be resolved under the original Government pleading involved, therefore, the nature and extent of

(1) stoppages in shipment of coal, and

(2) price fluctuations.

If (as the Government contended in its memorandum) the constitutionality of the statute depends upon the existence of such burdens to interstate commerce as might have been caused by a recurrence of stoppages in shipment of coal, or of violent price fluctuations, then the nature and extent of that recurrence become a proper subject of inquiry (*Chastleton Corp.* v. *Sinclair,* 264 U. S. 543; *Borden's Co.* v. *Baldwin,* 293 U. S. 194, 209-210).

2. Evidence as to Nature and Extent of Alleged Interruptions and Stoppages in the Shipment of Coal.

The recent history of the bituminous coal industry breaks into four periods: (1) the pre-war period, (2) the war period and post-war period (1916-1922), (3) the period from 1923 to 1933, and (4) the NRA period (see FF. at R. 147, 151, 159, 197).

The pre-war period, now more than twenty years past, appears to us obviously to be too remote to have substantial probative value in determining whether the industry has

been so subject to interruptions and stoppages as to warrant national price and wage fixing today.

The war period and post-war period were likewise remote, and were also wholly unusual, the industry having been tremendously stimulated by the war, so that prices and wages rose to abnormal heights, conditions being further accentuated by a chronic railway car shortage, which came to an end in 1923 (FF. 92, R. 159).

The NRA period was also unusual, having both benefited and suffered from artificial stimuli of an unconstitutional character.

Accordingly, the important period for our consideration is that from 1923 to 1933. This was a period of gradual decline in production, in the number of men employed, and in prices. The reasons for this were principally (1) improved methods for saving in fuel consumption, (2) the shift in the steel industry from crude heavy products to light products requiring less fuel and to the substitution of scrap iron for virgin pig iron, and (3) competition of other sources of energy, notably of oil, natural gas and hydroelectric power (FF. 76, R. 146-147; FF. 55, R. 136). None of these is, of course, eliminated or in any way affected so as to increase the use of coal, through the regulatory system of the Guffey Act.[1]

But, from the point of view of effect on interstate commerce, the pertinent subjects of inquiry were:

> (1) What has been the extent of interruptions of commerce (if any) during the years in question?

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[1]In fact, the Guffey Act will certainly increase prices, and this in turn will certainly tend further to decrease the use of coal in favor of other fuel substitutes and through improvements in burning apparatus to save fuel (FF. 53-55, R. 134-136).

(2) What were the causes?

(3) Are there any provisions of the statute designed to cure those causes?

Plaintiff believes that the evidence conclusively establishes:

(1) That there were no interruptions of shipments in recent years that were due to other than natural economic causes (such as lack of demand), or physical causes (such as breakdowns), except for a few sporadic labor disturbances;

(2) That such minor interruptions as did occur did not result in any material interruptions of commerce;

(3) That the statute contains no provision designed to cure the underlying economic causes of the alleged excess of competition in the industry, viz., over-capacity (quite apart from the fundamental legal argument that cure of interruptions of production as such is outside the power of Congress).

A. ALLEGED INTERRUPTIONS OF PRODUCTION.

The official figures of the Bureau of Mines, introduced in evidence by Mr. Tryon, the Government expert, showed that the following figures represent the annual averages for the periods shown (Def. Ex. 4a, R. 1006; and FF. 57-58, R. 137-138):

	35-year period (1899-1933)		Test period (1923-1933)	
Maximum potential working days		308		308
Days idle—				
Labor disputes	11		9	
Other causes	93	104	114	123
Average days worked		204		185

Mr. Tryon further testified that, for the period 1890-1914, an average of 9 days per year were lost through breakdowns and power failures, and 34 days through seasonal fluctuations of demand. He identified no other specific causes for interruptions.

The significance of these statistics lies in the fact that, of the various causes for interruptions and stoppages of shipments (which in this industry are practically coincidental with production),[2] the only cause for which a remedy is sought to be provided in the statute, or in respect of which evidence was sought to be introduced in support of the statute, is the item of labor disputes.

In other words, a nation-wide scheme of local regulation is sought to be supported under the commerce clause, because such scheme purports to provide a remedy for a factor which has been responsible (according to the Government's own Exhibit) for only about 10% of the idle time at the mines.

More significant yet is the utter absence from the record of any showing that even that 10% resulted in any

[2]The government introduced production figures as representative of shipments, because customarily coal is shipped as soon as produced (FF. 48, R. 132).

diminution of aggregate production, or of aggregate shipments, in the long run. Every presumption is to the contrary—that the 9 or 10 days recorded as lost on account of labor disputes were in the end not lost at all—for doubtless they simply resulted in reducing the number of days lost through lack of orders, seasonal fluctuations or other causes.

The Government's Exhibit (4a) gives mute testimony to this presumption. Thus, for the period 1923-1933, by far the worst year from the point of view of labor disputes was 1927, in which 45 days, or 36 more than the annual average for the period, were lost on that account; yet the average number of days worked in that year was 191, *i. e.*, not less than the average for the period, but actually 6 days more than the average.

And the witnesses themselves had to admit the lack of substantial connection between labor disputes and coal consumption.[3]

Of the bad year 1927, Mr. Murray, Vice-President of the United Mine Workers of America, and one of the principal Government witnesses, testified:

> "In 1927, as in the earlier strikes, the difficulty of the mine workers was that the non-striking territories continued to ship coal into markets that would otherwise have taken the coal that the men on strike would have mined if they had not been on strike. There is no question as to that." (R. 456)

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[3]Of course, a local dispute will tie up the production at a particular mine and consequently the interstate shipments from such mines, *Coronado Co.* v. *United Mine Workers of America,* 268 U. S. 295; but the record shows that the market thus vacated is promptly filled by the product of a competing mine (R. 456).

Tryon testified as to that same year, 1927:

> "We have no record that any consumer of coal in the United States actually went without it in that year (1927) because of a labor dispute." (R. 330)

It is apparent, therefore, that whatever production was lost through strikes (even in the worst year, 1927) was made up either by production by other mines or by working later in the year at the same mines on days on which otherwise the mines would have had to be closed for lack of demand or other causes.

Of the year 1933, which was an average year (having 9 days idle on account of labor disputes), Mr. Murray testified that the disputes "were sporadic outbreaks taking place in individual mines * * *" (R. 455).

It is apparent, therefore, that there is nothing in this record to support the proposition that labor disputes or any other causes, when viewed nationally, have given rise to material burdens or obstructions to commerce among the several states in bituminous coal.

B. Alleged price fluctuations.

Contract prices represent about 75% of the coal sales, and spot prices 25%. Of these (FF. 56, R. 136-137; R. 298) spot prices generally fluctuate much more than contract prices (R. 299). But even the spot price curve from 1923 to 1931 does not show violent fluctuations (FF. 97, R. 162; R. 318).

The foregoing statements were all made by the Government expert from the Bureau of Mines, Mr. Tryon, and in themselves dispose of the affirmative defense that price

regulation has been rendered necessary by violent price fluctuations.

The affirmative defense made particular reference to the supply of bituminous coal for railroad fuel as evidencing the impact of coal production conditions on interstate commerce. However, any theory of violent fluctuation in prices to the railroads was also disposed of by Mr. Tryon (R. 321-322), resulting in a finding of fact that "There have been no violent fluctuations in the prices of bituminous coal for railroad fuel since 1923" (FF. 98, R. 162).

Price fluctuations being a comparative term, evidence was introduced by the plaintiff, and findings were made, as to price fluctuations in other commodities.

> "During the period from 1926 to 1934 the wholesale delivered prices of bituminous coal have had considerably less fluctuation than either the average of all commodities, or the average of all raw materials, or of the following specific commodities: non-ferrous metals, petroleum products, lumber, cotton goods, and hides and skins (Tr. 1569 [R. 552], Pl. Exs. 60, 70-A, 70-B). During the period 1929-1935 retail prices of bituminous coal have had less fluctuation than those of meats, cereals, other foods and the average of all foods, and also of anthracite (Tr. 1571 [R. 553], Pl. Ex. 71)." (FF. 99, R. 163).

3. So-called Diversions and Dislocations of Interstate Commerce.

The allegations of the affirmative defense having completely failed of proof, the Government's answer was

amended at the trial so as to include allegations of diversion and dislocation of commerce, of which the following is fairly typical (R. 105, *cf.* R. 34):

> "For many years the distribution and marketing of bituminous coal in interstate commerce has been subject (a) to sudden unforeseeable, recurrent and prolonged interruptions and stoppages in the shipment of such coal from the producing areas to the consuming markets *and to substantial diversions and dislocations of such coal shipments;* * * *" [New matter in italics].

These amendments were made in the course of the trial, and as a result of the fact that the proof, having completely failed to sustain either the allegations that there were recurrent or prolonged stoppages or interruptions in interstate commerce, or the allegations that there had been violent or extremely wide price fluctuations, had however shown that there had been some shift in business from Northern producers to Southern producers. No subject received more attention or occupies more space in the Record than this one. The Government's theory evidently is that the Congress has the power under the Constitution to restrain Southern producers from taking markets away from Northern producers, this extraordinary doctrine being based upon the theory that this constitutes a "diversion and dislocation" of interstate commerce. Concededly, it is not a burden or obstruction, for then the amendment to the pleading would be unnecessary.

A glance at the elaborate charts submitted by the Government to show the increase in production in Kentucky, West Virginia and Virginia, and the corresponding de-

crease in the so-called Northern Competitive Field (Pennsylvania, Ohio, Indiana and Illinois) illustrates this extraordinary theory at a glance.

Thus, Government Exhibits 25 and 26 (R. 1067-1068) are charts purporting to show how rises and falls in shipments from Illinois mines are conversely matched by falls and rises in shipments from Kentucky mines.

Government Exhibit 28 (R. 1069) purports to show in graphic waves the fact that between 1913 and 1934, of the seven States in question, the three States of Kentucky, West Virginia and Virginia increased their share of the common markets from approximately 30% to approximately 50%.

Government Exhibit 30-A (R. 1076B) shows, by numerous graphic charts, the source of this "evil", in that as the prices charged by the West Virginia or Kentucky mines (as the case may be) fall below those of Pennsylvania, Ohio and Illinois, so their shipments rise above those of their Northern rivals. In Government Exhibit 31-A (R. 1078A), the same tale is graphically told for the two "groups" as a whole (Northern and Southern).

As a matter of fact, this rivalry between the North and the South is the subject matter of the Government's Exhibits from 24 through 34 (R. 1062 through R. 1080-C). Most of these exhibits were carefully prepared and elaborately commented on by Mr. Berquist, a witness called from the National Recovery Administration (R. 459-475).

The only inference reasonably to be drawn from this evidence is that the Government takes the position that the Federal Government has the power to preserve or to

"freeze" commerce within existing channels, or indeed to shift it from one channel to another.[4]

As bearing upon the implications of the Government's theory that the commerce power includes the power to prevent one State from obtaining a competitive advantage that it had not theretofore had over another State in a common market, evidence was introduced by the plaintiff to indicate what might have been the effect of such legislation if it had been indulged in by the Congress at earlier stages of our history.

It appears of record that in the year 1820 the only bituminous coal producing State was Maryland (See Pl. Ex. 69, R. 946-A). Could the Congress have passed a statute in 1820 designed to confine the production of bituminous coal in the United States to the State of Maryland so that the "normal flow" of commerce from that State would not be "diverted" to Pennsylvania?

The largest producing State in 1934 (West Virginia with 27.3%) did not even appear among the larger producers in 1850, and in 1880 was producing only 4.3%. Can it be seriously suggested that the Congress could either have excluded West Virginia from the production of coal, or have rivetted it to its 4% share based on 1880?

There appear to be two justifications for introducing this strange issue into this record, the first being that the

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[4]Thus, Mr. O'Neill, the principal producer witness for the government, after referring to the "normal flow" of commerce (R. 365), then gave his philosophy of "natural markets" (R. 366):

> "When I testified before the House that Pennsylvania has a natural market, I meant by that a market close-by, where freight rates ought to be substantially lower than from far-distant fields. It seems to me that the close-by fields should supply the coal to those markets under any fair competitive circumstances" (R. 366).

allegations as to stoppages and price fluctuations having failed, a sort of counsel of desperation dictated evidence of these "diversions" and "dislocations", and the second, and perhaps more reasonable, explanation being that, inasmuch as the heart of the statute, and its expressed purpose, is to stabilize the industry by fastening it down to conditions "heretofore existing", it was appropriate to seek to justify such a provision.

One provision in question is that which directs the local District Boards to coordinate prices

> "to the end of affording the producers in the several districts substantially the same opportunity to dispose of their coals upon a competitive basis as has heretofore existed" (Act, Sec. 4, Part II(b), Appendix, p. *15,* fol. 53; Code, Part II, 5; R. 64).

In other words, what the Congress refrained from doing for Maryland in 1820, and for Pennsylvania in 1880, it now does for States enjoying markets that otherwise they might lose with the further progress of competition.

4. Evidence as to the Volume of Coal Sold for Shipment Across State Lines—Comparison of Coal Industry with Others.

The statute applies without distinction to all sales of coal whether intended or ever in fact resulting in shipment across State lines or not. However, the record shows (1) that nearly one-half of all of the coal sold in the United States is consigned to intrastate destinations and (2) that there are many states in which only a negligible amount of coal is imported from other states.

A. PROPORTION OF TOTAL COAL IN THE UNITED STATES SOLD FOR CONSIGNMENT TO INTERSTATE DESTINATIONS.

The record shows that practically all coal is delivered f. o. b. mine; and further that at least 42% of the total coal sold is consigned to *intra*state points and not more than 58% to *inter*state destinations. These figures were provided only in respect of the year 1929 (the only year for which complete figures as to distribution were available), and are determined by combining the facts shown in defendants' Exhibit 14 (R. 1019) with those shown in plaintiff's Exhibit 67 (R. 941), both exhibits having been compiled by the Bureau of Mines. Defendants' Exhibit 14 gives the following percentages:

Railroad fuel delivered to carriers subject to *jurisdiction of the Interstate* Commerce Commission	23.76
Other intrastate shipments plus local sales	26.21
Other interstate (and foreign) shipments	50.03
	100.00

Plaintiff's Exhibit 67 gives the division of the railroad fuel deliveries:

Deliveries on which freight was paid	30.9
Deliveries on which no freight was paid	69.1

"Deliveries on which no freight was paid" represent, of course, deliveries to the consuming railroad at the mouth of the mine, with no further consignment, and accordingly relate to wholly local transactions. "Deliveries on which freight was paid" may represent either deliveries consigned to ultimate destination within the same state, or may represent deliveries consigned to ultimate destinations in other States. The figures of 58% and 42% for interstate and intrastate shipments, respectively, are based upon

the assumption (favorable to the Government) that all "deliveries on which freight was paid" were for interstate shipment. Accordingly, the aggregate figures are:

Interstate Transactions	
Railroad fuel	7.34[5]
Other interstate sales	50.03
	57.37
Intrastate Transactions	
Railroad fuel	16.42[5]
Other intrastate sales	26.21
	42.63

B. States in which very little interstate commerce occurs.

The sole basis in the record for the following Finding of Ultimate Fact:

> "175. The distribution and marketing of bituminous coal within the United States is predominantly interstate in character, and the interstate distribution and sale and the intrastate distribution and sale of such coal are so intimately and inextricably connected, related and interwoven that the regulation of interstate transactions of distribution and sale cannot be accomplished effectively without discrimination against interstate commerce unless transactions of intrastate distribution and sale be regulated" (R. 209),

is in the following stipulation (R. 376):

> " 'The competitive situation is such that the effect upon intrastate sales resulting from a minimum-

[5]Being respectively 30.9% and 69.1% of all railroad fuel (see tables in text, *supra*).

price regulation for interstate sales, if such regulation were not applied to intrastate sales, would be to give such a competitive advantage to the intrastate seller that the interstate seller could not fairly compete with him, so that there would result a discrimination against the interstate seller.'

"2. That the other Government producer witnesses would each make the same answer in respect of the producing and marketing territories as to which they testified and as to the other areas of substantial production throughout the country to which they testified.

"Mr. Whitney[6] stated that he made no concession as to the legal effect of such evidence upon the issues in this case but that he makes no contention that such evidence is incompetent or inadmissible as a conclusion."

The fair construction of this stipulation appears to be that, *wherever* interstate coal comes into competition with intrastate coal, regulation of the price of either would be discriminatory against the other, unless the other were likewise regulated; but it leaves open entirely the question as to the territories in which such competition exists. Obviously, individual producers (such as those who testified for the Government) or other witnesses could not identify by oral testimony all of the territories in which such a state of competition exists, and similarly identify the territories in which it does not exist. This must be ascertained by reference to the documentary testimony (produced from the Bureau of Mines). This clearly shows that, although no doubt interstate coal comes into competition with intrastate coal in many, if not most, of the consuming markets

[6]Trial counsel for the petitioner.

in this country, it by no means follows that there are not large and substantial markets which are wholly supplied by intrastate shipments. This being the case, the Finding of Ultimate Fact No. 175 must clearly be construed in the light of the record, and thereby to mean, not that *all* interstate and intrastate distribution comes into competition, but simply that *wherever* that state of facts does exist, there discrimination would result unless both be regulated.

Defendants' Exhibit 9 (R. 1014) (also based on 1929 figures) gives the most reliable evidence as to the distribution of coal by States.

The Findings of Fact include the statement that:

> "In every state producing bituminous coal intrastate shipments from the mines of that state meet active competition from interstate shipments" (FF. 47, R. 132).

This finding leaves open the *extent* of such "active competition". The Finding of Fact refers to Defendants' Exhibits 9, 10, 15 and 16; and a close examination of those exhibits (all of which are taken from official Government publications) shows that in the cases of many States the competition between interstate shipments and intrastate shipments is negligible.

Alabama

One of the largest producing States is Alabama. In the test year of 1929, only 3% of the coal shipped by rail or by river to destinations in Alabama came from other States. 97% was produced in Alabama. Defendants' Exhibit 9 shows that 9,419,956 tons were thus shipped to Alabama destinations, of which 9,118,794 tons were produced in Alabama fields. It is evident that, although the 300,000

tons from other fields may have provided "active competition", such shipments were trivial compared to the intrastate shipments. The competition could not, therefore, have been really serious, and there must be great stretches in the State of Alabama into which no interstate coal penetrated at all.

Colorado

Even more striking is the case of the largest Western producing state—Colorado. Defendants' Exhibit 9 shows that shipments to Colorado destinations in 1929 aggregated 4,663,683 tons, of which those shipped from Colorado fields aggregated 4,618,169 tons. In other words, less than 1% of the shipments to Colorado destinations moved in interstate commerce.

Pennsylvania

Less extreme, but none the less significant, figures are shown for the largest producing State in 1929—the State of Pennsylvania. Much was made on the trial of the "dislocation" of commerce involved in invasion of Pennsylvania markets by West Virginia producers. As a matter of fact, the defendants' exhibits show that shipments to Pennsylvania destinations in that year were 38,585,891 tons from Pennsylvania fields and 4,937,358 tons from West Virginia fields.

C. COMPARISON WITH OTHER INDUSTRIES.

The Government's affirmative defense alleged (R. 33-34) that:

> "Commercially important deposits of bituminous coal within the United States are limited to 23 pro-

> ducing areas confined within the boundaries of 26 States and more than 70% of the total annual output is mined in 4 States."

In the opening arguments before the trial court, repeated reference was made by the Government to the fact that the coal industry was *sui generis* for the reason, among others, that coal was produced in a limited number of States but was shipped throughout the Union. The thought evidently was that the coal industry had a peculiarly *national* character.

It is obvious, however, that this is equally true of most industries, and, as examples, there appear in the Record under Plaintiff's Exhibit 81 numerous maps and charts showing graphically that the same considerations apply in a more extreme manner to anthracite coal, iron ore, copper, salt, oranges and other basic commodities. If it be established that the fact that coal is predominantly produced in certain States, or even exclusively produced in certain States, entitles the Federal Government under the provisions of the commerce clause to regulate its local production, then the same will apply to the industries named, and to innumerable others.

5. Evidence that the Fundamental Evil in the Industry—Over-Capacity—Will Be Accentuated, Rather than Alleviated, by the Statute.

The trial court found that:

> "The fundamental or chief underlying evil of the bituminous coal industry is over-capacity." (FF. 57, R. 137)

This was the unanimous conviction of the Government witnesses (Tryon, of the Bureau of Mines, at R. 326; the Pennsylvania operator, O'Neill, at R. 368; and the Department of Labor statitistician, Lubin, at R. 476).

Obviously, the cure for over-capacity is to limit capacity. And prior to the decision in the *Schechter* case the Guffey bill pending before Congress was expressly based upon the principle of governmental limitation of capacity and production (*Hearings before the Committee on Interstate Commerce of the Senate on Stabilization of the Bituminous Coal Mining Industry, 74th Cong., First Sess., 1935,* referred to in the Government's Answer, R. 35, and, at the request of the Government, submitted for judicial notice by the Court). This was considered absolutely essential to accomplish the purpose of curing the fundamental or underlying evil. Thus, the Pennsylvania operator, O'Neill, testified for the Government in those hearings:

> "So far as I know no price fixing plan has ever worked unless it had back of it control of production, and under this bill, control of capacity as well" (R. 364).

On its face, this statement is consistent only with the conclusion that the present statute cannot work (for, exclusive of the wage and hour provisions, the present statute provides only for price control). Mr. O'Neill temporized on cross-examination by saying that the present Act would work for a year without limitation of production, but that control of production would have to be provided by the next Congress:

> "I have always had the idea that price control was one of the essential elements of any scheme of regulation of the industry by the Government.

> Another essential element is the proposition that there might be production control. I think that is an essential element. It is not provided for in this statute because it was taken out. I think price control can be made to function almost as a production control *temporarily,* and if the finding of Congress is later that it is necessary to amend it it can do so and price control will operate a sufficient length of time to develop that situation, in my opinion. It is my opinion that the present Act needs the amendment to provide for limitation of production, finally, if it is going to be made to operate successfully. I think it could be made to operate successfully for the time being, as it now is. I think the first price list will operate successfully for [illegible]derable period of time. I would say that it wou[illegible] *go along for a year.*" (R. 363)

The question may well be asked, why (if over-capacity is the fundamental evil of the industry) did Congress change from a bill designed to cure that evil to a bill designed only to provide higher wages and prices. The answer appears in the testimony of all the witnesses, viz., that the primary purpose is to increase the income of the operators and miners.[6a] The sequence of thought is conclusively shown in the testimony of the Government expert, Mr. Tryon, of the Bureau of Mines (R. 326):

> (1) "Over-capacity is the fundamental and underlying evil of the coal industry."
>
> (2) "Increases in prices, under any system of stabilized control of the market, will in time need

[6a] Another obvious purpose was, however, to set up a device for production control in the sense of pro-ration of production among the various areas, districts, and mines. This was to correct the "injustices" caused by the Southern mines taking business away from the Northern mines.

to be accompanied by some control of sales tonnages, or some control of capacity, in order to be effective over the long run"

Because

(3) "It is the normal tendency in mineral economics for increases in prices to lead to increases in number of mines or wells"

Yet

(4) "I think prices would be higher than they would otherwise be, at the same levels of production cost, under the Act"

But

(5) "However, if prices are set at minimum levels and are effectively policed and maintained, the result on the financial position of the industry will be beneficial from the point of view of lessening the present financial losses of the operator and of making it possible for him to pay a reasonable wage. I believe the collective effect of the Guffey Act would be to stabilize prices, to increase the sales realization of the operator, to enable him to avoid some at least of the present loss incurred, and to enable him to pay some higher wage than he would otherwise be able to pay."

In other words:

(1) The fundamental evil of the industry can be cured only by limitation of production.

(2) The present statute does not provide for national *limitation* of production (although it does provide for *allocation* as among the different States).

(3) But the present statute provides for increasing prices.

(4) To be sure, by the normal workings of mineral economics, this would naturally increase nation-wide production instead of decreasing it, and therefore would tend to increase the *fundamental* evil of the industry.

(5) Notwithstanding that it would increase the fundamental evil of the industry, it will be beneficial *because* it will increase the profits of the operator and the wages of the miner.

6. Evidence as to the Coercive Effect of the Penalty Tax.

The trial court sustained the plaintiff in his contention that the tax was compulsive in character, and accordingly entered a permanent injunction against assessment or collection of the tax during the period required to litigate the constitutional issue presented by the Government in its affirmative defense. This part of the decree is questioned by the Government's petition in *Helvering* v. *Carter*, No. 651, and discussion of the question in point of law will be reserved for our answering brief in that case.

A. As to Carter Coal Company.

Neither in the present year nor at any time during the past eight years have the net proceeds of Carter Coal Company equaled 15%, or, for that matter, 13½%, of the total sales price received by the Company at the mine. In 1934, the most profitable year for Carter Coal Company during that entire period (Def. Ex. 47, R. 1163), the

net profit of the Company was $323,998; yet the 15% tax would have been $587,740 and the 13½% tax would have been $528,966 (FF. 40, R. 128). The Court further found (FF. 41, R. 129) that it is the view of the officers and directors charged with the management of Carter Coal Company, and of all its voting shareholders, that the tax provisions of Section 3 will in fact induce the Company to accept and comply with the Code,[7] and further that:

> "The weight of the tax is such, compared with the earnings of the Company, that it could not long continue in business and pay the said 13½% tax" (FF. 41, R. 129).

It is obvious that should Carter Coal Company be compelled to discontinue its business this would result in the loss to the Company and its stockholders of its presently existing valuable goodwill, and would make it impossible for the Company to carry out contracts at the time existing. The court below found that the Company has been doing business since 1912, has a valuable goodwill and established registered trade names for its products, and presently has customers with whom it has been dealing with regularity, and also that the goodwill and going concern value of the Company are of substantial value (FF. 37, R. 127). The court also found that the Company has presently existing contracts for the sale of an aggregate of 850,750 net tons of coal at an aggregate price f. o. b. mines of $1,004,765, all of which contracts run at least to May 27, 1936, and most of which continue beyond that date (FF. 39, R. 127), and that therefore the Company cannot avoid the penalties

[7]Unless, of course, relief is obtained from the courts.

of the tax by shutting down, without thereby subjecting itself to other equally undesirable penalties for breach of contract.

B. As to the industry generally.

Finding of Fact No. 41 (R. 128), based principally upon the testimony by Government witnesses, covers this point completely and the pertinent portion is here set out:

> "41. Bituminous coal producing companies generally have not earned 13½% of their mine realization price as a net profit at any time during the last eight or nine years. In the view of those familiar with the bituminous coal industry the tax provisions of Section 3 will in fact induce those bituminous coal producing companies who are opposed to the Code to accept and comply with the Code * * *" (R. 128-129).[8]

C. Background of the tax provision as shown by the evidence.

The operators, who were called as witnesses by the Government, testified that the Guffey Act was designed to re-enact for the coal industry the provisions of the National Industrial Recovery Act, and to add to them sanctions which would compel compliance in a manner which the National Industrial Recovery Act had failed to accomplish. Mr. O'Neill, testifying for the Pennsylvania producers in favor of the statute, said:

> "So far as the companies which can evade the Code, the amount of the penalty taken out of their sales

[8]The balance of the Finding has been quoted above in regard to Carter Coal Company.

> realization will take whatever advantage they have in cost, and their competition will be fair. It will add to them that much additional cost. I think the 13½% tax added to their cost will stop them from breaking down the Code and prices fixed under it." (R. 365; and see also Mr. O'Neill, at R. 361.)

Mr. Findlay, testifying for the Ohio producers in favor of the statute, said:

> "I think there are provisions in this Code, by Act of Congress, that will give the enforcement bodies opportunity to effectively enforce the Code, which they did not have under the old Code. I do not know of any company which I honestly believe makes a net profit of more than 13½% of its sales price." (R. 394-395)

7. Evidence as to the Effect of Transportation Charges.

Upwards of 50% of the delivered cost of coal is represented by freight charges, the percentage having in fact exceeded 60% during 1932 and 1933 (FF. 63a, R. 140).

Indeed, the Pennsylvania producer O'Neill, testifying for the Government, confirmed on cross-examination that he had been right in testifying before the Congress in 1932 that "the chief trouble with the coal industry today is freight rates" (R. 368), and that accordingly

> "It is my opinion that the most important thing that can be done to improve the situation in the industry is for the railroads to put the destination price of coal where it will successfully meet its present-day competitors, from whom they get very little traffic." (R. 369)

8. Evidence Relating to Wage Levels.

Whether or not wages are fair and reasonable, whether or not hours are excessive, and whether or not working conditions generally in the coal industry are satisfactory from the point of view of social conscience, are questions the importance of which we do not dispute. In view of the firmly established principle that wages, hours and working conditions of miners are not within the regulatory power of the Federal Government, however, we are at a loss to understand their applicability to the determination of the constitutionality of the statute.

However, the salient features of the voluminous testimony introduced by the Government on this subject will be outlined here.

The Government's theory appears to be three-fold: (1) that miners' wages declined unduly during the test period 1923-1933; (2) that Northern wages were dragged down by Southern wages; and (3) that miners' wages were lower during the depression than other wages. Numerous findings of fact were made on the subject by the court; but these findings actually refute the positions taken by the Government.

A. Trend of typical wages.

The findings state that the occupation of trackmen is typical of the skilled day workers underground, and most of the earnings figures are accordingly given for trackmen in Illinois (FF. 79 *et seq.*, R. 149 *et seq.*). The trend of trackmen's wages appears from the following figures contained in FF. 79, R. 149 and FF. 112, R. 173:

	Daily Wage	Annual Earnings
1899.....	$1.90	$445
1913.....	2.85	540
1923.....	7.50	1,185
1929.....	6.10	1,080
1932.....	5.00	560

It appears, therefore, that daily wages in the depths of the depression were at a level about equal to ⅔rds of the level of the post-war boom in coal, but still about twice as high as pre-war wages.

B. NORTHERN AND SOUTHERN WAGES CONTRASTED.

In the "diversion and dislocation" evidence, Kentucky was established as the competitor which was taking business from Illinois. See, *e. g.* Government Exs. 25 and 26 (R. 1067, 1068) showing the reciprocal rise and fall in Illinois and Kentucky tonnage. In meeting the argument that the South, by rapidly reducing wages, was unfairly taking business from the North, it seems appropriate, therefore, to compare the Kentucky trackman's wage (FF. 113, R. 174) with the Illinois trackman's wages. Figures are not given for the Kentucky trackman prior to the war; but after the war, the following appeared:

	Illinois Daily Wage	Illinois Annual Earning	Kentucky Daily Wage	Kentucky Annual Earning
1923	$7.50	$1,185	$5.58	$848
1929	6.10	1,080	4.87	1,081
1932	5.00	560	3.71	592

It is apparent that, so far as daily wage rates go, the two moved generally in unison, each earning about two-

thirds per day in 1932 of what he earned in 1923. From the viewpoint of annual earnings, however (which to the miner is much more important than the wage rate), it will be observed that the Kentucky man (instead of suffering in comparison with the Illinois man) has actually pulled himself up to a position of equality or better with the Illinois man. The "evil", if one exists, is that, as a result of a successful invasion of the "natural markets" of Illinois, the Kentucky operators have increased their business and the earnings of their employees at the expense of the Illinois operators and miners.

C. COMPARISON WITH COST OF LIVING.

No figures were introduced by the Government as to the cost of living, but the plaintiff introduced figures from the statistics of the Department of Labor, and appropriate findings were made thereon (FF. 116, R. 177) showing that the all-commodities price index declined from 100 in 1926 to 64 in 1932,—a decline roughly proportionate to the decline in earnings of the "typical" trackman, North or South.

D. MINE WAGES COMPARED WITH WAGES GENERALLY.

Here again, the Government introduced no figures, but the plaintiff introduced statistics of the Department of Labor, and an appropriate finding was made (FF. 125, R. 184) that average hourly wage rates paid to common laborers and to skilled textile workers in the South Atlantic and East South Central States have been in the neighborhood of two-thirds of the wage rates paid for the same

class of labor in the East North Central and Middle Atlantic States, and that "wage rates for coal miners during the same period in the two districts were, until the adoption of the National Recovery Act, roughly in the same ratio".

It was stipulated (R. 402) that the average wage for labor in all manufacturing industries in Illinois was $27.07 per week in 1923, and $18.28 per week in 1933, this being almost precisely in the same proportion borne by the "typical" trackmen's wages in Illinois in the same years ($7.50 and $5.00 per day). It is a matter of common knowledge, however, that the decline in real wages for labor in all manufacturing industries from 1923 to 1933 was infinitely greater than one-third, in that 1933 was a year of wide-spread unemployment in the manufacturing business. On the other hand, miners had the great advantage of being continued in employment through the spreading of work.

Bureau of Labor statistics figures showed for the depression period that average hourly earnings of "outside laborers" at the bituminous coal mines were—for the States of Pennsylvania, Ohio, West Virginia, Kentucky and Virginia—almost precisely the same as average hourly rates of common laborers in other industries; whereas, they were substantially higher in the States of Indiana, Illinois, Tennessee and Alabama. (Def. Ex. 53, R. 1174.)

9. The Purposes of the Statute, as Interpreted by the Witnesses Familiar with the Industry.

The purpose of the Guffey Act appears on its face, as hereinafter pointed out (Points I and II, *post* pp. 69, 79). In addition, a great deal of testimony was given at the

trial by Government witnesses as to the purpose and functioning of the statute. This evidence gave a fair cross-section of the opinion behind the bill, as the witnesses included experts from the Bureau of Mines and the Department of Labor, coal producers, labor leaders and social workers. Testimony was thereby obtained, from those familiar with the industry itself, as to the meaning of the term "stabilization", which all agreed was the great end to be attained.

Thus, the first witness, Mr. Tryon, expert of the Bureau of Mines, testified (R. 328):

> "By stabilization, I mean an attempt to put the industry on a basis on which heavy financial losses can be turned into a reasonable profit and in which the industry will be able to pay reasonable rates of wages."

The Pennsylvania producer, Mr. O'Neill, used almost the same language (R. 363):

> "By stabilization, I mean stability of competition, that is, fair pricing of coals to sell against each other in common consuming markets, and the other trade practices that go with such marketing, the maintenance of proper wage standards, maximum hours of labor, and conditions of employment."

Isador Lubin, United States Commissioner of Labor Statistics, opened his cross-examination with an explanation of what he considered to be the evils in the industry (R. 483):

> "When I said that the industry was decaying that was with reference to the general situation in terms of profits, opportunities for employment of

> miners, opportunities to earn money, wage rates, and the general economic situation in the industry."

At the close of the cross-examination, he gave his philosophy for a cure of these evils, presumably to be accomplished by this Federal regulation (R. 494):

> "*The economists,* in talking of the competitive system, justify it on the ground that it makes it possible for the individual who is most efficient, in terms of the type of product he gives to the consumer, and the relative cost of the product, to get the business and make the profits. The competitive system is a system of individual enterprise whereby individuals are *permitted* to enter into industries and use their ingenuity and capital in the production of goods for market. In industries in which it is found as a fact that the reward does not necessarily go to the efficient, I do not think individual enterprise should be forbidden, but I feel that we should fix the plan of competition so that they will all have to abide by the same rules of the game. *'We' is the economists."*

This is, in effect, an argument that Congress should have the power to impose upon industry a "planned economy," a power contended for in the *Schechter* case, and refused recognition by this Court.

The Tennessee operator, Mr. E. C. Mahan, was less profound, but perhaps more practical, when he said at the close of his cross-examination (R. 413-414):

> "I still feel as I did in 1932 when I said:
>
> 'Frankly speaking, personally, and not as a representative of the industry, if there was some way that I could unload my troubles on the Fed-

eral Government, I would be more than delighted to do so.' "

10. Evidence as to Coal Resources and Conservation.

This evidence hardly appears significant, in view of the fact that the statute (notwithstanding its title) contains no provision whatsoever for conservation, except a direction (in itself unobjectionable) to the Commission to make a study of the subject.

That there would have been no urgent need in any event to overthrow constitutional practice of 150 years' standing in the interests of coal conservation, is established by the findings of fact that:

(a) at 1929 rates of production and losses in mining, without allowing for the possibility of increase in consumption, total reserves of coal and lignite would suffice for 3,500 years (FF. 158, R. 203);

(b) at 1934 rates, the period would be longer (FF. 158, R. 203); and, although the bulk of these reserves (particularly the lignite) is low in grade,

(c) bituminous coal alone will last approximately 2,000 years at the 1929 rate of production and longer at the 1934 rate of production (FF. 161, R. 204); and

(d) the life of the bituminous coal of good quality and workable thickness and position which could be extracted at reasonable cost under present conditions is 300 years (FF. 161, R. 204).

11. Conclusion as to the Evidence.

Reviewing the evidence as an entirety, it appears indisputably to support the following conclusions:

(1) The underlying evil of the coal industry is over-capacity;

(2) This is not cured by the Guffey Act;

(3) Profits and wages have declined for many of those engaged in the industry, because of the highly competitive conditions existing therein;

(4) The Guffey Act makes an effort to yield higher profits and wages;

(5) This is accomplished by regulating wages with a view to enabling the miners to obtain higher wages than in the past and by prescription of minimum prices, thereby enabling the operators to pay higher wages and at the same time derive greater return for themselves, thus destroying the free play of competition and creating restraints upon the free movement of coal in interstate commerce by legislative fiat;

(6) Such higher prices and wages, although desirable from the point of view of certain operators and miners, will necessarily injure other operators and miners, who have been benefitting from the natural play of competition; and

(7) There have been no material interruptions or stoppages of interstate commerce in coal and no restraints or burdens upon its free movement or upon the free play of competition.

The foregoing conclusions are fully supported by the evidentiary findings of the court below, as well as by the evidence. Consequently, the conclusions which the trial court expressed in ultimate findings 180, 181, 182 and 184 (R. 210-211) with respect to the existence of burdens and restraints upon interstate commerce caused by "destructive price cutting," "unfair competitive practices," "disparities in wage rates," "unrestrained and destructive competition and the cutting of wage rates" (to each of which an exception was taken, R. 239), in so far as in conflict with the conclusions stated above, are in conflict with the court's own evidentiary findings and unsupported by any evidence. It is moreover clear that in expressing such conclusions the court was operating under a misconception of the meaning of the words "burdens" and "restraints," both as a matter of fact and of law, but particularly the latter. In other ultimate findings (FF. 178, 179, R. 210), upon which the findings in question depend, the court itself found that at present and for many years the business of mining and selling coal had been carried on under conditions of "unrestrained competition" leading to the "destructive competition" and "price cutting" referred to in these findings. The findings themselves on their face thus indicate the inconsistency of the trial court in concluding that the very concomitants of free and unrestrained competition, in other words, a free and open commerce in bituminous coal, may be made a predicate for a finding of burden or restraint. The findings as well as the evidence disclose the absence of any such. It is the purpose of the statute to create them, not to remove them. (See Point II, 7, pp. 103-112, *post*).

SPECIFICATION OF ERRORS

The Supreme Court of the District of Columbia erred:

1. In holding and concluding that the exactions imposed by Section 3 of the Act upon producers of bituminous coal failing to accept and comply with the Code are valid; and in failing to hold and conclude that the said exactions constitute penalties to enforce compliance with regulations not within the Federal power to prescribe, and are therefore invalid. (Assignments 31, 32, 33, 34, R. 237, 238; see Point I, *post.*)

2. In failing to find, hold, adjudge and decree that the Act and the Code are invalid because constituting a plan for the accomplishment of purposes not entrusted to the Federal Government by the Constitution; and in finding, holding, adjudging and decreeing that the Act and Code are constitutional, valid and enforceable in part. (Assignment 10, R. 234; see Point II, *post.*)

3. In failing to find, hold, adjudge and decree that the Act and the Code are invalid because violative of the Fifth Amendment; and in finding, holding, adjudging and decreeing that the Act and Code are constitutional, valid and enforceable in part. (Assignment 10, R. 234; see Point IX, *post.*)

4. In failing to hold and conclude that Section 4, Part III (a), (b) and (g) of the Act, and the corresponding sections of the Code, and each of them, are invalid because repugnant to and violative of the Fifth Amendment to the Constitution of the United States. (Assignment 12, R. 235; see Points IX and III, *post.*).

5. In failing to hold and conclude that Section 4, Part III (c), (d), (e) and (f) of the Act, and the corresponding sections of the Code, and each of them, are invalid because not within the power of the Congress under the Commerce Clause and because repugnant to the Fifth and Tenth Amendments to the Constitution of the United States. (Assignment 13, R. 235; see points IX and III, *post.*)

6. In holding and concluding that the labor provisions of the Act and of the Code are separable from the other provisions and in refusing to hold and conclude that the labor provisions are inseparable from the other provisions, and each of them, and particularly from the price fixing provisions. (Assignments 28, 29, R. 237; see Point IV, *post.*)

7. In refusing to hold and conclude that the price fixing provisions of the Act and of the Code are invalid because inseparable from the invalid labor provisions of the Act and Code. (Assignments 25, 10, R. 237, 234; see Point IV, *post.*)

8. In holding and concluding that the price fixing provisions of the Act and of the Code constitute a valid exercise of the power of the Congress to regulate interstate commerce; and in failing to hold and conclude that said provisions are not within the powers conferred upon the Congress by the Commerce Clause of the Constitution of the United States and are violative of the Tenth Amendment. (Assignments 19, 21 and 24, R. 235-236; see Points V, VI, VII, *post.*)

9. In holding and concluding that the price fixing provisions of the Act and of the Code are valid as applied to

all coal produced and sold; and in failing to hold and conclude that the price fixing provisions are invalid in their entirety since intended to be applicable in respect of transactions not within the power of the Congress to regulate. (Assignment 22, R. 236; see Point VII, *post.*)

10. In refusing to hold and conclude that Section 3 of the Act is not separable in its application to Section 4, or to the Code or to the several parts of each. (Assignment 30, R. 237; see Point VII, *post.*)

11. In holding and concluding that the price fixing provisions of the Act and of the Code contain no invalid delegation of authority, and in failing to hold and conclude that they constitute an unauthorized delegation of authority in violation of Article I, Sec. 1, and Article II, Sec. 2, Clause 2 of the Constitution of the United States and are arbitrary and violative of the Fifth Amendment. (Assignment 20, R. 236; see Points VIII and IX *post.*)

12. In holding and concluding that the price fixing provisions of the Act and of the Code are not arbitrary or unreasonable or unrelated to a proper Congressional purpose and do not violate the Fifth Amendment; and in refusing to hold and conclude to the contrary. (Assignment 23, R. 236; see Points IX and VI, *post.*)

13. In finding, holding and concluding that Section 4, Part II(i) of the Act and the corresponding section of the Code constitute a proper exercise of the interstate commerce power and do not violate the Fifth Amendment; and in failing to find, hold and conclude to the contrary. (Assignment 27, R. 237; see Points II, III and VI, *post.*)

14. In holding and concluding that plaintiff is entitled to the relief prayed only if the Code be invalid as an entirety, and in failing to hold and conclude that plaintiff is entitled to the relief prayed if any provision of the Act or Code challenged in this proceeding be invalid. (Assignment 11, R. 234-235; see Point X, *post.*)

15. In making findings of ultimate fact which are not supported by the evidentiary findings, are inconsistent with facts found or concluded, and are not supported by the evidence, as specified in Assignment 35 (R. 238, 239); in making findings of evidentiary facts that are not supported by the evidence and are inconsistent with other facts found, as specified in Assignment 37 (R. 241, 243); and in refusing to make findings of ultimate and evidentiary fact as specified in Assignments 36 and 38 (R. 239-241, 243-244). (See *ante* pp. 61-62 and Points II, VI, VII, IX and XI, *post.*)

16. In refusing to adjudge and decree the relief prayed for by the plaintiff, or any of such relief, as to each and every of the defendants severally, or as to any of them. (Assignments 2, 3 and 4, R. 233.)

17. In dismissing plaintiff's bill of complaint. (Assignment 5, R. 234.)

18. In overruling and denying plaintiff's applications for permanent injunction as prayed. (Assignments 1 and 34, R. 233, 238.)

19. In refusing to hold and conclude that the declaratory judgment statute is applicable to this controversy and to each and every part thereof severally, and in refusing to grant the declaratory relief prayed in the plaintiff's bill or any part thereof. (Assignments 6, 7, 14, 15, 16, 17 and 18, R. 234, 235.)

SUMMARY OF ARGUMENT

POINT I. THE SO-CALLED "TAX" IS IN REALITY A PENALTY TO ENFORCE COMPLIANCE WITH THE CODE, AND THE ACT CANNOT BE SUSTAINED AS AN EXERCISE OF THE FEDERAL TAXING POWER.

POINT II. THE STATUTE, CONSIDERED AS A WHOLE, IS INVALID.

POINT III. THE LABOR PROVISIONS OF THE ACT ARE INVALID.

POINT IV. SINCE THE LABOR PROVISIONS ARE INVALID AND THE CODE WAS SOUGHT TO BE ENACTED AS A WHOLE, THE ENTIRE REGULATORY SCHEME REPRESENTED BY THE CODE IS INVALID.

POINT V. THE FACT THAT SALES OF BITUMINOUS COAL CONTEMPLATE AND RESULT IN INTERSTATE MOVEMENTS OF SUCH COAL DOES NOT AUTHORIZE THE CONGRESS TO FIX THE SALES PRICE.

Part I. The Question Presented as to the Scope of the Commerce Clause, and the Settled Rules of Constitutional Interpretation Applicable to its Solution.

Part II. The Power Asserted by the Government is Destructive of the Principal of Duality in our System of Government, and is Repugnant to the Tenth Amendment.

Part III. The History of the Formation, Adoption and Ratification of the Constitution, and Contemporary Expositions thereof, Establish that the Power Now Asserted Was Not Granted.

Part IV. The Decisions of this Court under the Commerce Clause Support and are Consistent with this View.

POINT VI. THE PRICE FIXING PROVISIONS CANNOT BE SUSTAINED AS A MEANS FOR CARRYING INTO EXECUTION THE POWER TO REGULATE COMMERCE.

POINT VII. SINCE THE STATUTORY SCHEME IS MADE APPLICABLE TO ALL BITUMINOUS COAL PRODUCERS AND IN RESPECT OF ALL BITUMINOUS COAL PRODUCED, IT IS INVALID IN ITS ENTIRETY.

POINT VIII. THE MIMIMUM PRICE FIXING PROVISIONS OF THE STATUTE AND CODE ARE VOID BECAUSE INDEFINITE AND ARBITRARY AND BECAUSE CONSTITUTING AN UNLAWFUL DELEGATION OF LEGISLATIVE AUTHORITY.

POINT IX. THE STATUTE AND THE CODE ARE REPUGNANT TO THE FIFTH AMENDMENT.

POINT X. IF EITHER THE LABOR OR THE PRICE FIXING PROVISIONS BE INVALID, PETITIONER IS ENTITLED TO INJUNCTIONS AS PRAYED, IRRESPECTIVE OF THE QUESTION OF SEPARABILITY.

POINT XI. THE RIGHT TO EQUITABLE RELIEF IN THIS PROCEEDING IS CLEAR.

ARGUMENT

POINT I

THE SO-CALLED "TAX" IS IN REALITY A PENALTY TO ENFORCE COMPLIANCE WITH THE CODE, AND THE ACT CANNOT BE SUSTAINED AS AN EXERCISE OF THE FEDERAL TAXING POWER.

The recent decisions of this Court in *United States* v. *Constantine,* 80 L. Ed. 195, and *United States* v. *Butler,* No. 401, Oct. Term 1935, expressly reaffirmed and reapplied the doctrines of *Hill* v. *Wallace* and *Bailey* v. *Drexel Furniture Company* (the *Child Labor Tax Case*) to the effect that exactions entitled "taxes", but in reality designed to enforce compliance with the regulation of a course of conduct, can not be sustained as exercises of the taxing power of the United States. Those cases, and the principle which they reaffirmed, are too fresh in the mind of the Court to require restatement here.

On its face, by its title, and by its legislative history, the taxing section of the statute under review does not impose a tax at all but a penalty to enforce compliance with a course of conduct prescribed in the statute.

As previously pointed out, the title of the Act shows its regulatory character (see p. 2, *ante*).

In an attempt to lay a basis for the regulatory provisions to follow, Section 1 of the Act recites, among other things, that the interests of the Nation

> "require that the bituminous coal industry be regulated as herein provided" (Appendix, p. 2, fol. 3);

that production and distribution of bituminous coal directly affect interstate commerce

> "and render regulation of all such production and distribution imperative for the protection of such commerce" (Appendix, p. *2*, fol. 4);

that

> "control of such production and regulation of the prices realized by the producers thereof are necessary to promote its interstate commerce" (Appendix, p. *3*, fol. 6);

and that practices prevailing in the bituminous coal industry

> "directly affect its interstate commerce and require regulation" (Appendix, p. *3*, fol. 6).

That such regulation is the primary purpose of this statute is also put beyond question by its legislative history. It is sufficient for present purposes to refer to the opening sentence of the Majority Report of the House Committee which reported out the bill which became the Guffey Act. That Committee said:

> "The purpose of the bill herewith reported is to provide for Federal regulation of the bituminous-coal industry" (House Report No. 1800, 74th Cong., 1st Sess., p. 1).[1]

Yet, with this primary purpose, the regulatory provisions of the statute are contained in a section (Sec. 4, Ap-

[1]It is worthy of note that this Report contains no express statement that the statute is constitutional, and contains no recommendations that the bill do pass.

pendix, pp. *7-25,* fols. 23-93) which on its face purports to set up a voluntary code.[2]

Compulsion is applied by Section 3 (Appendix, pp. *6-7,* fols. 18-22), which imposes a tax of 15% of the sales price (or fair market value) "upon the sale or other disposal of *all bituminous coal produced in the United States,*" but provides that producers accepting the Code and complying with it are entitled to a drawback in the form of a credit equivalent to 90% of the amount of the tax. The result is that producers who join the Code will pay a tax of but 1½%, while producers who refuse to submit to the regulation of the Code are taxed 15%, on the sales price of all coal produced by them.

It thus appears, on the face of the statute, that the tax is intended to operate not as a taxing provision but as a penalty to enforce compliance with the regulation of conduct.[3]

Upon this point *Bailey* v. *Drexel Furniture Company* (*Child Labor Tax Case*), 259 U. S. 20, and *Hill* v. *Wallace,* 259 U. S. 44, are conclusive.

In the *Child Labor Tax Case* the Federal statute provided that any person operating a mine, quarry or factory employing child labor should thereby become subject to an excise tax equivalent to 10% of its entire annual net prof-

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[2]The statement of the minority of the House Committee (House Report No. 1800, *ante,* p. 45) in respect of this matter has remained unchallenged to this date. That report stated: "Although the code which the bill prescribes is supposedly voluntary, compulsion is directly applied by levying a tax on bituminous coal and allowing a refund of 90 percent thereof to mine operators who assent to, and comply with, its provisions."

[3]As previously pointed out (pp. 50-53, *ante*), the evidence and findings establish that this penalty provision is effective for the accomplishment of the purpose so intended (FF. 40-41, R. 128-129; FF. 15, R. 117-118; R. 366, 395, 414-415, 8, 19, 12, 41, 257-258).

its. No tax was imposed upon persons not employing child labor. The statute contained specific details as to what should be considered the employment of child labor within the meaning of the Act. This Court had previously held invalid an Act of Congress prohibiting the transportation in interstate commerce of goods made at factories which employed child labor, *Hammer* v. *Dagenhart,* 247 U. S. 251. In the *Child Labor Tax Case* the Court found that "Congress in the name of a tax which on the face of the act is a penalty" (p. 39) was seeking to do what the Court had held in *Hammer* v. *Dagenhart* that it had no power to accomplish. The Court ruled that "the so-called tax is a penalty to coerce people of a State to act as Congress wishes them to act in respect of a matter completely the business of the state government under the Federal Constitution" (259 U. S., at p. 39).

The Court recognized that it is sometimes difficult to distinguish between a tax and a penalty, but concluded that when it appears from the face of the statute that the purpose is regulation and the tax merely the means of enforcement, then "the so-called tax * * * loses its character as such and becomes a mere penalty with the characteristics of regulation and punishment" (p. 38).

The Government had argued (259 U. S., at pp. 21-22) that so long as the statute did not expressly *prohibit* the course of conduct and add the so-called tax as an express penalty for breach of the prohibition, then the Court could not say that the tax was a penalty. The Court ruled, however, that where the tax is imposed if a course of conduct outlined in the law is not followed, and is not imposed if such course of conduct is followed, it is a penalty and not a tax.

To similar effect, the Court said at pages 37-38, and repeated in *Hill* v. *Wallace,* in the same volume at pages 67-68:

> "Out of a proper respect for the acts of a coordinate branch of the Government, this court has gone far to sustain taxing acts as such, even though there has been ground for suspecting from the weight of the tax it was intended to destroy its subject. But, in the act before us, the presumption of validity cannot prevail, because the proof of the contrary is found on the very face of its provisions. Grant the validity of this law, and all that Congress would need to do, hereafter, in seeking to take over to its control any one of the great number of subjects of public interest, jurisdiction of which the States have never parted with, and which are reserved to them by the Tenth Amendment, would be to enact a detailed measure of complete regulation of the subject and enforce it by a so-called tax upon departures from it. To give such magic to the word 'tax' would be to break down all constitutional limitation of the powers of Congress and completely wipe out the sovereignty of the States."

Hill v. *Wallace* involved the constitutionality of the Future Trading Act of 1921, entitled "An Act Taxing contracts for the sale of grain for future delivery, and options for such contracts, and providing for the regulation of boards of trade, and for other purposes." It imposed a tax of 20 cents per pushel on every contract of sale of grain for future delivery, excepting (a) those made by farmers or farmers' cooperative associations, and (b) those made by members of a board of trade which had been designated by the Secretary of Agriculture as a "contract market." The Secretary of Agriculture was authorized to designate

boards of trade as contract markets only after they had complied with certain regulations and conditions promulgated by him, including the requirement that they admit cooperative associations to membership; that they delete their rules prohibiting rebates on commissions in the case of cooperatives; that they make and file reports of all transactions with the Secretary and submit to rules calculated to prevent the promulgation of inaccurate or misleading reports of the manipulation of prices or corners. The statute, therefore, was on the same model as the statute here at bar, —the Future Trading Act of 1921 being a statute designed to force the acceptance of Federal regulation of grain markets under the penalty of a 20 cent per bushel tax for failure to comply with the regulations, and the present statute being an attempt to coerce bituminous coal producers into surrendering to Federal regulation of their prices, wages, hours and trade practices in order to obtain a "drawback", the loss of which would be in effect a 13½% tax upon their sales.

This Court, in a unanimous opinion by Mr. Chief Justice Taft, held that, under the principles announced in the *Child Labor Tax Case,* the statute could not be sustained as an exercise of the Federal taxing power. The Chief Justice said:

> "It is impossible to escape the conviction, from a full reading of this law, that it was enacted for the purpose of regulating the conduct of business of boards of trade through supervision of the Secretary of Agriculture and the use of an administrative tribunal * * *. Indeed the title of the act recites that one of its purposes is the regulation of boards of trade * * *. The manifest purpose of the tax is to compel boards of trade to comply with regulations, many of which can have no relevancy to the collec-

> tion of the tax * * *. The act is in essence and on its face a complete regulation of boards of trade, with a penalty of 20 cents a bushel on all 'futures' to coerce boards of trade and their members into compliance. When this purpose is declared in the title to the bill, and is so clear from the effect of the provisions of the bill itself, it leaves no ground upon which the provisions we have been considering can be sustained as a valid exercise of the taxing power" (pp. 66-67).

The Court then referred to its decision in the *Child Labor Tax Case* and continued:

> "This has complete application to the act before us, and requires us to hold that the provisions of the act we have been discussing can not be sustained as an exercise of the taxing power of Congress conferred by § 8, Article I" (p. 68).

The Court then inquired:

> "Can these regulations of boards of trade by Congress be sustained under the commerce clause of the Constitution?" (p. 68).

Finding that on its face the statute did not purport to be a regulation of *interstate commerce* but only to be a regulation of local boards of trade, as was shown by its very title (259 U. S., p. 68), the Court declared the whole statute unconstitutional.[4]

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[4]In the *Child Labor Tax Case* and in *Hill* v. *Wallace*, there were *two* rulings made by the Court from the face of each of the statutes (1) that the "tax" was not a tax but a penalty to enforce compliance with regulations, and (2) that the regulations were beyond the power of the Congress under the Commerce Clause. On this tax point, and for the moment, the cases are relied upon for the first of such findings only.

The principle thus applied in *Hill* v. *Wallace* has also "complete application" to the case at bar. Here, as there, the statute shows on its face and by its title that it is not for the purpose of raising revenue but is for the purpose of compelling submission of coal producers to the regulations for the conduct of their business which are set forth in great detail in the Act.

The rulings in these cases have never been questioned or qualified in any way by this Court, but on the contrary have recently been extended to cover cases within their principle although not in all respects similar. Thus, in *U. S.* v. *Butler,* the doctrine was applied although the attempt was not to regulate the conduct of the person taxed, as it is under the instant statute and was under the statutes involved in *Child Labor Tax Case* and in *Hill* v. *Wallace.* To rule that the tax in the instant case, which is not laid upon every person who produces coal, but only on those producers who refuse to submit to Federal regulation of their wages, hours and sales prices, among other things, is not a true tax is but to follow the settled rulings of this Court in *Hill* v. *Wallace* and *Child Labor Tax Case* on the indisputable proposition that where the statute on its face purports to regulate the conduct of the person subjected to the tax, it is a penalty and not a tax; that it cannot be sustained under the taxing power and can in no event be upheld unless as a penalty to enforce a regulation which is itself valid under the Commerce Clause and the Fifth Amendment.

The circumstance that in the Guffey Act the tax is in form laid equally on all producers of bituminous coal, but with a drawback simultaneously credited to those who assent to the Code, of course cannot serve to distinguish

this statute in any way from the statutes involved in the *Child Labor Tax Case* and in *Hill* v. *Wallace*. The tax is still for the purpose of regulating the conduct of those taxed; the Act shows on its face that the regulation is the primary purpose; and, to the extent that it is here challenged, it falls only upon those who fail to submit to the regulation. To characterize this as an exercise of the taxing power would have the result thus stated by this Court in both *Hill* v. *Wallace* (259 U. S. at pp. 67-68) and the *Child Labor Tax Case* (259 U. S. at p. 38):

> "Grant the validity of this law, and all that Congress would need to do, hereafter, in seeking to take over to its control any one of the great number of subjects of public interest, jurisdiction of which the States have never parted with, and which are reserved to them by the Tenth Amendment, would be to enact a detailed measure of complete regulation of the subject and enforce it by a so-called tax upon departures from it."

Constitutional limitations may not be escaped by so transparent a device. It is the substance and not the form which controls. As this Court said in *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, at page 581:

> "If it be true that by varying the form the substance may be changed, it is not easy to see that anything would remain of the limitations of the Constitution, or of the rule of taxation and representation, so carefully recognized and guarded in favor of the citizens of each State. But constitutional provisions cannot be thus evaded. It is the substance and not the form which controls, as has indeed been established by repeated decisions of this court."

In what must be regarded as silent acquiesence in the rule of the cases just reviewed, the Government did not attempt, either in pleading or in argument in the court below, to sustain the validity of the so-called "tax" independently of the validity of the statute considered as a regulatory measure. Its position was that the constitutionality of the statute depended upon establishing the regulatory provisions of the Act and of the Code as valid exercises of the commerce power and as consistent with the Fifth Amendment, with the "tax" a mere enforcement device, valid if "in aid of lawful regulation".[5] By confession, therefore, both tax and Code must fall unless the latter is a valid regulation of interstate commerce, and otherwise consistent with constitutional guaranties and restrictions. To the questions thus presented, the remainder of this brief is devoted.

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[5]The phrase is taken from the Government's brief in the court below.

POINT II.

THE STATUTE, CONSIDERED AS A WHOLE, IS INVALID.

1. In determining the constitutionality of the Act, the Court will and must consider its purpose.

This follows of necessity from cases cited under Point I, in which the Court held statutes enacted under the taxing power to be invalid because it appeared that their real purpose was to regulate matters not committed to the Federal Government, but reserved to the people and the States. As early as *M'Culloch* v. *Maryland,* 4 Wheat. 316, Chief Justice Marshall said (p. 423):

> "Should Congress, in the execution of its powers, adopt measures which are prohibited by the constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government; it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land."

In *Linder* v. *United States,* 268 U. S. 5, 17, the Court said:

> "Congress cannot, under the pretext of executing delegated power, pass laws for the accomplishment of objects not entrusted to the Federal Government. And we accept as established doctrine that any provision of an act of Congress ostensibly enacted under power granted by the Constitution, not naturally and reasonably adapted to the effective exercise of such power but solely to the achievement of something plainly within power reserved to the States, is invalid and cannot be enforced."

In *City of New York* v. *Miln*, 11 Pet. 102, 132, where the question was whether a State statute was a regulation of commerce and, therefore, an infringement upon powers granted to the Federal Government, the Court said:

> "If, as we think, it be a regulation, not of commerce, but police; then it is not taken from the States. To decide this, let us examine its *purpose*, the end to be attained, and the means of its attainment."

In three cases at the present term the Court has reaffirmed this doctrine of the *M'Culloch* and *Linder* cases. In *United States* v. *Constantine* (decided December 9, 1935), the rule was applied in respect of a Federal statute as to which it was found that

> "under the guise of a taxing act the *purpose* is to usurp the police powers of the State."

In *United States* v. *Butler* (decided January 6, 1936), again applying the rule, the Court referred to it as the

> "established principle that the attainment of a prohibited end may not be accomplished under the pretext of the exertion of powers which are granted."

And in *Ashwander* v. *Tennessee Valley Authority* (decided February 17, 1936), although the Federal authority under the war and commerce powers as there narrowly asserted was sustained, the Court warned that

> "The Congress may not, 'under the pretext of executing its powers, pass laws for the accomplishment of objects not entrusted to the government'. Chief Justice Marshall, in *McCulloch* v. *Maryland*, 4 Wheat. 316, 423; *Linder* v. *United States*, 268 U. S. 15, 17."

and noted that

> "The Government's argument recognizes this essential limitation."

The rule thus stated finds its origin in the fact that the Federal Government is a government of limited and enumerated powers. If, notwithstanding this, Congress under the guise of exercising a delegated power could "pass laws for the accomplishment of objects not entrusted to" the Federal Government, it could by the enactment of a statute, in form within the delegated powers, exercise powers not delegated and invade the rights reserved by the Tenth Amendment to the States and to the people. Accordingly, this Court has not hesitated to declare such statutes unconstitutional.[1]

Many of these decisions were by a unanimous court. In those by a divided court, the division was not as to the right and duty of the court to determine the purpose of the Act, as related to the objects entrusted to the Federal Government, but as to whether the purposes and objects of the Act fell within those so entrusted. In each case the Act in question was in form an exercise of a delegated power. And this, of course, will always be so. The Act, however, having for its purpose and object "the accomplishment of objects not entrusted to" the Federal Government, was set aside.

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[1] *Hill* v. *Wallace*, 259 U. S. 44; *Child Labor Tax Case*, 259 U. S. 20; *Linder* v. *United States*, 268 U. S. 5; *United States* v. *Dewitt*, 9 Wall. 41; *Keller* v. *U. S.*, 213 U. S. 138; *Hammer* v. *Dagenhart*, 247 U. S. 251; *Retirement Board* v. *Alton R. Co.*, 295 U. S. 330; *Schechter Corp.* v. *United States*, 295 U. S. 495; *United States* v. *Constantine* (decided December 9, 1935); *United States* v. *Butler* (decided January 6, 1936).

To examine the purposes and objects of the Act and its necessary effect is not to impinge upon the legislative powers of Congress or to inquire into its motives. The inquiry into such purpose, object and effect is made in order to determine whether or not the Federal Government has exceeded its powers. Were the Court not possessed of authority to make such inquiry, and should it fail to exercise the duty arising therefrom, the Federal Government would cease to be a government of limited and enumerated powers, and its legislative powers would be exercised subject only to the restraint of Congress itself.

2. The Act has for its purpose, not the regulation of interstate commerce, but the stabilization of a productive industry (*i.e.*, bituminous coal), by subjecting it to Federal regulation, to the end that producers and miners alike may obtain a greater degree of the national income than in the past, through regulation and stabilization of wages and the elimination of free competition among producers.

A. THIS APPEARS FROM THE TITLE OF THE ACT AND FROM ITS LEGISLATIVE HISTORY.

Resort to the title of a statute for the determination of its purpose is always the first subject of judicial inquiry. *Hill* v. *Wallace,* 259 U. S. 44, 66, 67. The title of the Guffey Act opens with the declaration that it is an Act "to stabilize the bituminous coal mining industry and promote its interstate commerce"[1] (Appendix, p. *2,* fol. 1).

[1]As appears from the Committee Reports, from the text of the Act, and from the evidence of so-called "economic facts" upon which the Act was sought to be supported in the court below, the object and purpose of the Act is neither to increase the production of bitumi-

The remaining purposes of the Act, as expressed in the title, are:

(1) "To provide for the cooperative marketing of bituminous coal" (Appendix, p. *2*, fol. 1).

> The cooperative marketing provisions of the Act, legalizing the establishment of marketing agencies through a voluntary association of producers (Sec. 4, Part I(a), paragraphs 2, 3, 4 and 5, Appendix, pp. *8-9*, fols. 28-32), constitute wholly minor provisions of the Code sought to be established by the Act and are dependent in turn upon the validity of such Code. This is neither a major purpose nor one disassociated from the purpose to set up a complete scheme of regulation.

(2) "To levy a tax on bituminous coal and provide for a drawback under certain conditions" (Appendix, p. *2*, fol. 1).

> This has already been fully discussed under Point I. As thereby appears, the taxing provisions of the Act are invalid as an exercise of the taxing power and valid only if permissible as a penalty to compel obedience to the regulatory provisions of the statute.

(3) "To declare the *production*, distribution and *use* of bituminous coal to be affected with a national interest" (Appendix, p. *2*, fol. 1).

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nous coal nor to free it in its interstate movement from artificial restraints and burdens (which are non-existent), but, instead, is to control the production of such coal and the conditions under which it is produced, and to impose restraints by operation of law upon its free movement in interstate commerce. See pp. 62, 103-112, *ante* and *post*.

This is a purpose clearly beyond any power specifically delegated to the Congress by any provision of the Constitution.

(4) "To conserve the bituminous coal resources of the United States" (Appendix, p. *2*, fol. 1).

The substantive provisions[2] of this Act make no provision for such conservation except as attempted control of production[3] may have such effect. That Congress may not exercise control over production has been repeatedly held by this Court.[4] Under the text of the Act itself, therefore, conservation of bituminous coal resources of the United States may not properly be regarded as an inde-

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[2]Section 16(1) directs the Commission to investigate "the economic operation of mines with the view to the conservation of the national coal resources" (Appendix, p. *35*, fol. 133).

[3]Section 1 of the statute declares that "the conservation of bituminous coal deposits in the United States by *controlled production* * * * require that the bituminous coal industry be regulated as herein provided", and the same section further recites that "control of such production" is necessary to accomplish the purposes of the Act (Appendix, p. *2*, fol. 3).

[4]*Schechter Corp.* v. *United States*, 295 U. S. 495, 547; *Kidd* v. *Pearson*, 128 U. S. 1, 21; *Hammer* v. *Dagenhart*, 247 U. S. 251, 272, 276; *United Mine Workers* v. *Coronado Coal Co.*, 259 U. S. 344, 407, 410; *Heisler* v. *Thomas Colliery Co.*, 260 U. S. 245, 259; *Oliver Iron Co.* v. *Lord*, 262 U. S. 172, 178; *Delaware, Lackawanna & Western R. R. Co.* v. *Yurkonis*, 238 U. S. 439, 444, 445; *United Leather Workers* v. *Herkert*, 265 U. S. 457, 464, 465, 470, 471; *Utah Power & L. Co.* v. *Pfost*, 286 U. S. 165, 181; *Champlin Co.* v. *Commission*, 286 U. S. 210; *Chassaniol* v. *Greenwood*, 291 U. S. 584, 587.

While *United States* v. *Butler* (decided January 6, 1936) was decided by a divided court, there was no dissent as to the lack of power in Congress directly to regulate production, and in view of the unanimous decision in *Schechter Poultry Corporation* v. *United States, supra*, and other prior decisions of this Court, could not well have been.

pendent purpose but as merely a by-product of the regulatory provisions contained in the Act for the purpose of stabilizing the industry.

(5) "To provide for the general welfare and for other purposes" (Appendix, p. *2*, fol. 1).

> Congress is concedely without power to legislate for the general welfare.[5] The inclusion of this as among the purposes of the Act, so far from bringing its object within those entrusted to Congress, discloses that its purpose was to legislate upon matters beyond the federal field.[6]

It thus appears from the title of the Act itself that its fundamental, indeed, as we think, its sole purpose, is to stabilize the bituminous coal industry.

That such was its purpose is evideneed by the Committee Reports.

The *House Committee Report* opens with the statement:

> "The purpose of the bill herewith reported is to provide for federal regulation of the bituminous coal industry" and continues with the statement that the "health and well-being of many people" require it. (H. Rep. No. 1800, 74th Cong., 1st Sess., p. 1.)

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[5] *Jacobson* v. *Massachusetts*, 197 U. S. 11, 22; *cf. United States* v. *Butler* (decided January 9, 1936).

[6] It should be said in passing that when both the Act itself and the economic facts offered in its support are fully analzyed, the Act is seen to be one not to regulate interstate commerce but "to provide for the general welfare" (Appendix, p. *2*, fol. 1) and that this part of the title, while indicative of a purpose to legislate beyond the Federal sphere, is in reality a proper declaration of the power sought to be exercised in its enactment.

The minority of the House Committee (*House Report*, No. 1800, *supra*, p. 45) thus characterized the bill:

> "This bill proposes to establish a 'little N.R.A.' for the bituminous-coal industry, with the attendant regulation of wages, hours, prices, and trade practices."[7] (*Id.*, p. 45.)

B. THAT SUCH WAS THE PURPOSE OF THE ACT IS EVIDENCED BOTH BY THE PROVISIONS OF THE ACT AND BY THE EVIDENCE OF SO-CALLED "ECONOMIC FACTS" OFFERED IN SUPPORT OF ITS VALIDITY.

The desired stabilization is sought to be brought about by the regulation of wages and the fixing of minimum prices, the latter to be fixed in accordance with a formula provided in the statute "In order to sustain the stabilization of wages, working conditions, and maximum hours of labor" (Act, Sec. 4, Part II (a), Appendix, p. *11*, fol. 38), the determination of which, in turn, is governed by its labor provisions.

The evidence of so-called "economic facts" in support of the constitutionality of the Act as an exercise of the commerce power, failed to establish the existence of any existing restraints or burdens upon the interstate movement of coal, in the sense in which those words have been employed in the prior decisions of this Court, or of the existence of any such burdens or restraints in the past.[8] On the contrary, the complaint is that the movement of

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[7]That this is an accurate statement is evidenced by the fact that the Code, provided for in the Act, is in effect a reenactment by statute of the Bituminous Coal Code adopted under NRA except that its labor provisions are even more onerous and indefensible. The NRA Code is in the record (R. 877-922).

[8]See Review of the Evidence, pp. 28-62, *ante*.

coal is too free, due to keen, and at times "destructive," rivalry among producers, each striving for business.

The Act in its recitals (Sec. 1, Appendix, p. *3*, fol. 5) makes reference to "the excessive facilities for the production of bituminous coal and the overexpansion of the industry". This recital is supported by the evidence of "economic facts" relied on, which show that the industry is overexpanded and that the capacity of the mines exceeds normal demand. As a result of this condition, as appears from the evidence, there has been severe price competition among the several mines and the several areas of production. As a result the returns to the operators as a whole have been inadequate, and many have operated at a loss. Wages constitute 65% of the total cost of mining coal. Consequently, in the competitive strife for business, wages or wage rates have been reduced in one field in order to admit of the sale of coal at lower prices, resulting in reductions in wages or wage rates[9] in competing fields for the purpose of enabling the producers therein to meet such prices. Price competition has, therefore, resulted—not in any burden upon *interstate commerce* or any reduction of it—but in reduction of *wages* or *wage rates* of persons engaged within the several States in mining coal. In order that the miners may receive higher wages and the operators greater return the Act seeks to "stabilize the industry" by stabilizing wages and prices through Federal regulation of both.

That this, and not the regulation of interstate commerce, is the aim and purpose of the Act and of all of its provisions is established not only by the title, the legislative history of the Act, its text and the "economic facts" offered in its support, but by the manner in which obedience to its

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[9]See footnote 6, page 26, *ante*.

regulatory provisions is sought to be enforced. The penalty tax (Sec. 3, Appendix, pp. *6-7*, fols. 18-22) is imposed upon *all* bituminous coal produced in the United States, whether the producer thereof sells any of his coal in interstate commerce or not. It is imposed upon captive coal, the producers of which are not engaged in commerce in coal, either state or interstate, but only in the production of coal for their own use. Nevertheless, these producers can escape the penalty tax only by becoming members of the Code and thus subjecting themselves to the labor provisions of the Act regulating the wages, hours and working conditions of their employees, and their labor relations with such employees. Since these captive mine owners are not engaged in the sale of coal, the purpose of compelling their obedience to the Code was not, of course, to subject them to price control. Its purpose was to subject them to the labor provisions of the Act, *i.e.*, a regulation of production, solely in the execution of the purpose to stabilize the industry through the stabilization of wages.

The prices to be fixed under the Act apply to all coal mined and sold within the United States by all Code members, whether sold in interstate commerce or not. All Code members are forbidden to sell coal either in state or interstate commerce at prices below the minimum or above the maximum fixed by the Act (Sec. 4, Part II(e), Appendix, p. *17*, fols. 61-63). The only way in which an operator selling no coal in interstate commerce can escape observance of Code prices is by failing to join the Code, in which event he is subjected to the ruinous penalty tax provided by Section 3. There is no way in which a Code member, selling both in inter and in intrastate commerce, can escape observance of prices fixed for coal sold within the State and

never moving beyond it, without becoming guilty of a violation of the Code, and thus becoming subject to the full tax. The evidence shows that but 58% of the coal mined is consigned to interstate destinations, while 42% is not.[10]

By subjecting all to the penalty, labor, and price-fixing provisions of the statute, Congress thus made it manifest that its purpose is not to regulate interstate commerce in coal but to regulate the industry.

Congress may not, under the guise of the commerce power, regulate prices at which *all* coal may be sold irrespective of whether it is the subject of interstate commerce.[11] This is so despite the fact that effective control of the prices of coal sold in interstate commerce may not be exercised without assuming control of the prices of coal sold in intrastate commerce coming in competition therewith (R. 376; FF. 52, R. 134). No support under the commerce clause may be derived from the power exercised by Congress in respect of railroad rates for this attempt *wholly* to regulate intrastate transactions. The exercise of this power must be conditioned in every case upon proof of a resulting discrimination against interstate commerce, itself predicated upon a factual finding made in the exercise of the power exerted.[12] No blanket authority to exercise price control over any service or commodity, to the invasion of

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[10]See pp. 41-42, *ante.*

[11]*Employers' Liability Cases,* 207 U. S. 463; *Trade-Mark Cases,* 100 U. S. 82, 96, where it was said with respect to the statute before the Court: "If its main purpose be to establish a regulation applicable to all trade, or to commerce at all points, especially if it be apparent that it is designed to govern the commerce wholly between citizens of the same State, it is obviously the exercise of a power not confided to Congress." See discussion, Point VII, *post.*

[12]*Houston & Texas Ry.* v. *U. S.,* 234 U. S. 342; *Wisconsin R. R. Comm.* v. *C. B. & Q. R. R. Co.,* 257 U. S. 563; *Florida* v. *U. S.* 282 U. S. 194.

the reserved powers of the States, is within the power of Congress. Its attempted exercise in this case finds no parallel either in the decisions under the Transportation Act —distinguished as they are by the fact, among others, that in that instance Congress was regulating an instrumentality of interstate commerce—or in any provision of the Constitution.

The exercise of an assumed power to fix the price of all coal, whether sold in interstate commerce or not, is not the exercise of the power to regulate interstate commerce. If, however, the purpose of the statute was to stabilize the industry as a whole, control of all prices was an appropriate and necessary step in the execution of such purpose. This is evident not only from the face of the Act but also from the evidence of economic facts relied on in its support, from which it appears that at least 42% of the coal mined is not the subject of interstate commerce. For the purpose of regulating interstate commerce, this blanket provision is clearly in excess of Federal power. For the purpose of stabilization, its attempted exercise was necessary to bring this large volume of coal under the regulatory provisions of the Act. If the latter, as we insist, was the real purpose, such provision was not only necessary but it may not be fairly assumed that Congress would have passed the statute except for the inclusion under its regulatory provisions of coal consumed in the state in which mined and never passing outside of it. The extension of the statute to intrastate coal, therefore, is further and conclusive evidence that its purpose was not to regulate interstate commerce in coal but to regulate the entire industry itself in order to stabilize it.

3. The intended purpose and necessary effect of the Act is to allocate the production of coal among the several States, beyond the scope of any power conferred upon Congress, and in violation of the Tenth Amendment.

Congress is without power to regulate or control production.[1]

The necessary effect of the Act is not only to regulate the production of coal through its labor provisions, but to allocate the production of such coal among the several States, and the several mines. This is made plain by the price-fixing provisions of the Act, themselves. This would be true if the minimum prices were required to be fixed upon the basis of cost at each mine. It is no less true because such prices are to be "coordinated" so as to afford "the producers in the several districts substantially the same opportunity to dispose of their coals upon a competitive basis as heretofore existed" (Sec. 4, Part II(b), Appendix, p. *15,* fol. 53). What this means is not plain. No standard for the determination of such "heretofore existing opportunity" is created by the statute.[2] If it means preservation of the "competitive basis" as among the "several districts" at the time of the passage of the Act, the effect is to freeze production of coal in the several competing districts in the relative proportions in which they were producing and selling against each other at the time of the passage of the Act. If it does not refer to the "competitive basis" existing at the time of the pas-

[1]See cases cited footnote 4, p. 84, *ante.*

[2]This alone is enough to render the price fixing provisions, even if considered independently, void for indefiniteness and as an unauthorized delegation of legislative power (See Point VIII, p. 236, *et seq., post*).

sage of the Act, it leaves to the district boards and the Commission the power to determine as to what period such "competitive basis" shall be determined, without guide or standard. But, whatever it means, it means in the last analysis power not only to control production through regulation of wages, hours, prices and like matters, but to allocate production as among the several States.

This is made plain both by the price-fixing machinery and by the geographical limits of the districts into which coal producing areas are to be divided for the purpose of price-fixing. The "coordination" is to be by districts. Its purpose is to fix relative minimum prices within such districts and at the several mines therein. Upon the relativity of the prices so fixed depends the ability of each mine to produce and sell. Although there does exist a limited amount of storage facilities for coal, it is undisputed that coal is customarily produced only for the purpose of filling orders already received (FF. 49, R. 133). Relative prices as among the several district and mines, therefore, control the amount of coal to be produced by each (FF. 47, R. 132), and this, of course, would be true whether production were usually preceded by orders or not, although less directly so.

Of the twenty-three price-fixing districts established by the Act, fifteen are located wholly within State lines (Districts Nos. 2, 3, 4, 5, 6, 9, 10, 11, 12, 16, 18, 19, 20, 22 and 23—Annex to Act—Schedule of Districts, Appendix p. *37, et seq.*, fol. 144, *et seq.*). The principal production of coal is in minimum price area No. 1, as defined in Sec. 4, Part II, sub-sec. (a) under the sub-heading "Minimum-Price-Area Table." (Appendix, pp. *11-12,* fols. 40-43). This minimum price area includes thirteen districts, each of which is in keen competition with the others, including, as

it does, substantially all of the Northern and Southern mines. Of these thirteen districts nine are located wholly within State lines. The necessary effect of the fixation of the relative minimum prices for these several districts and for each of the mines therein is, therefore, to allocate and control the quantity of coal to be produced in each of such districts. Where the boundaries of the districts are coterminous with State lines, this is a direct allocation to the State of the quantity of coal which may be produced therein. The same is also true where a State is divided into two or more districts. It is equally true where a district includes more than one State or parts of more than one State, particularly since the price-fixing agencies of the Act are not only empowered but directed to make variations in price at the several mines (Sec. 4, Part II (a); Appendix, p. *11*, fols. 37-38). The Act thus confers upon the price-fixing agencies set up by the Act the power to allocate production and the duty to exercise its powers for that purpose through the fixation of relative prices.

This necessary effect of the Act is not the by-product of the regulation of interstate commerce. Its purpose is not to foster and promote interstate commerce in any proper sense of those words. Its intended purpose is not only to permit, but to require, such allocation as a necessary means of "stabilizing" the industry. It may be said that the purpose is to preserve competitive opportunity, but only that competitive opportunity which the statute and the action taken thereunder permits. Congress is without the power to say to West Virginia or Illinois how much coal it shall produce and where it shall sell it, either absolutely or in relation to each other. To assert the existence of such power in Congress is to assert its power to control

the economic life of the several States under the guise of regulating interstate commerce, and because the products of those States find markets outside the State of their production. To state this proposition is to answer it. Yet it is obvious that the whole purpose of the Act fails unless its purpose to control and allocate production by the coordination of prices, as well as the regulation of wages, hours and labor relations, may be carried out. It is by these means and these means alone that the industry is to be stabilized. Its purpose is not to promote interstate commerce but to determine the extent to which the several States may engage therein. Under its provisions opportunity to engage further in interstate commerce and the extent of such engagement ceases to be a matter of right and becomes one of privilege to be exercised only insofar as the administrative agencies set up by the Act permit.[3]

That one of the chief purposes of the Act is to allocate production among the several states is made plain by the evidence of "economic facts" offered by the Government in support of the Act. From this evidence, it appears that of late years the keenest rivalry to be found in any part of the industry is that between the Northern mines (Pennsylvania, Ohio, Indiana and Illinois) and the Southern mines (Kentucky, Virginia and West Virginia) for the sale of coal in competing markets of consumption. It also appears that as a result of this rivalry there has been a steady increase in the proportion of tonnage supplied by the Southern mines in these consuming markets, and a steady decrease in that supplied by the Northern mines (FF. 70-74, R. 144-146). It also appears that the diver-

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[3]As to the right to engage in interstate commerce see Point V, at pp. 153, 184, 188, *post*.

sion of tonnage from the Northern mines to the Southern mines in the past has been due in substantial measure to the relatively lower wage rates paid in the South,[4] particularly at a period when the Northern mines were unionized and the Southern mines were not. By subjecting all to the payment of wages and the observance of hours to be determined as to all by the United Mine Workers, the labor provisions of the Act are intended to control the relative cost of mining in these two competitive areas of production. Minimum prices are then to be based upon such costs, to be coordinated, however, so as to afford producers in the Northern and Southern fields respectively "substantially the same opportunity to dispose of their coals upon a competitive basis as has heretofore existed". The purpose, as well as the effect, therefore, however this indefinite phrase may be construed, and however it may be administered, is to delegate to the price-fixing agencies, set up under the Act, the power to determine how much coal shall be mined in each of these competing States. This is so because their ability to produce depends, of course, upon their ability to sell.

Witnesses for the Government testified that effective control of the industry could not be brought about without a control and allocation of production (R. 326, 363-4). This statute does not, in terms, confer power to allocate production among the several States capable of producing coal, or among the mines engaged therein. The intended purpose, as well as the necessary effect of the price-fixing machinery, however, is to confer upon the price-fixing agencies the

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[4]There is, however, evidence and a finding that the Southern mines during such period have also enjoyed other advantages, including better quality coal, better natural conditions such as thicker seams, etc. (FF. 74, R. 145-146).

power to allocate production[5] among districts upon an indefinite standard of heretofore existing "opportunity", and to exercise the same power in respect of the several mines, since the same price-fixing agencies are empowered to vary the prices within a given district, mine by mine.

The object and purpose of this statute is thus not to regulate interstate commerce in coal, but to stabilize the industry by the regulation of wages, by the prevention of free competition, and by the allocation of production among the States, to the end that the producers as a whole may obtain larger returns from their operations, and the miners higher wages than in the past. Otherwise expressed, the purpose is to insure to those engaged in the industry, whether operators or miners, a larger share of the national income than they have heretofore enjoyed.

4. Congress is without power, generally, either to stabilize or regulate productive industry, and certainly without power to allocate the production of ordinary articles of commerce among the States.

None of the powers stated is within the enumerated powers specifically delegated to the Congress. To read them into the Commerce Clause is in effect to convert that clause into a general welfare clause, under which the Congress would be empowered to enact any statute, affecting the economic life of the Nation, deemed by it to be wise

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[5]The introductory section of the Act states that: "It is further recognized and declared * * * that *control of such production* and regulation of the prices * * * are necessary to promote its interstate commerce * * *" (Appendix, p. 3, fol. 6). The Pennsylvania operator, O'Neill, a Government witness testified that: "I think *price control* can be made to function almost as a *production control* temporarily * * *" (R. 363).

or expedient for the purpose of promoting the national welfare. However broad or narrow the scope of the power to regulate interstate commerce, it does not extend this far, nor does it include the power generally to stabilize or regulate productive industry or allocate production among the several States (See Point V, pp. 140-216, *post*). So to construe it would be contrary to the reserved powers of the States and the people, embodied in the Tenth Amendment, and contrary to the whole scheme of the Constitution.

5. The Act may not be sustained unless its provisions and purpose bear a reasonable relation to the regulation of interstate commerce.

This is well settled.[1] In *Linder* v. *United States,* 268 U. S. 5, 17, the Court stated it to be "established doctrine" that:

> "any provision of an act of Congress ostensibly enacted under power granted by the Constitution, not naturally and reasonably adapted to the effective exercise of such power but solely to the achievement of something plainly within power reserved to the States, is invalid and cannot be enforced."

As stated in *Adair* v. *United States,* 208 U. S. 161, 178:

> "Manifestly, any rule prescribed for the conduct of interstate commerce, in order to be within the

[1] *Adair* v. *United States,* 208 U. S. 161, 178; *Retirement Board* v. *Alton R. Co.,* 295 U. S. 330, 347; *Hammer* v. *Dagenhart,* 247 U. S. 251, 276; *Child Labor Tax Case,* 259 U. S. 20, 37. See *Mugler* v. *Kansas,* 123 U. S. 623, 626; *Triegle* v. *Acme Homestead Association* (decided February 3, 1936, p. 6).

> competency of Congress under its power to regulate commerce among the States, must have some real or substantial relation to or connection with the commerce regulated."

In *Mugler* v. *Kansas,* 123 U. S. 623, 661, the Court, speaking of the scope of the police power,[2] said:

> "* * * If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."

Unless, therefore, the purpose of the Act and the means of its attainment bear a reasonable relation to the power delegated, the Act falls outside the power. Otherwise the Federal Government would cease to be a government of limited and enumerated powers.[3]

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[2]The requirement of reasonable relation is also a component of due process. See *Retirement Board* v. *Alton R. Co.,* 295 U. S. 330, 347.

[3]In those cases in which the court divided there was no difference of view as to the test, but only as to its application. See *Chicago B. & Q. Ry. Co.* v. *Drainage Commissioners,* 200 U. S. 561, 593, where the Court, adverting to this rule, remarked that "Upon the general subject there is no real conflict among the adjudged cases."

6. Neither the purpose of the statute nor the means adopted for its accomplishment bear any reasonable relation to the regulation of interstate commerce.

A. THE BASIC CONTENTION OF THE GOVERNMENT AND THE SO-CALLED ECONOMIC FACTS UPON WHICH PREDICATED ARE PRECISELY THOSE SUBMITTED AND REJECTED IN SUPPORT OF THE CONSTITUTIONALITY OF THE NATIONAL RECOVERY ACT; AND, IF ACCEPTED, WOULD BE EQUIVALENT TO THE ACCEPTANCE OF A CONCEPT OF THE COMMERCE POWER UNDER WHICH CONGRESS COULD REGULATE ALL PRODUCTIVE INDUSTRY.

The basic argument of the Government in the Court below was as follows;

> (1) That bituminous coal is an essential commodity, necessary for the maintenance of industrial activity and for the transportation of other articles in interstate commerce;
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> (2) That it is produced in some, only, of the States, its principal production being confined to four States, while it is used in all;
>
> (3) That over a period of years the wages paid and returns received have been inadequate;
>
> (4) That only the Federal Government can effectively control and regulate the industry so as to eradicate the unsatisfactory conditions existing therein, and hence
>
> (5) That it is competent for the Congress to declare such industry to be affected with a national public interest, and assume regulation and control thereof.

Precisely the same considerations were pressed upon the Court in *Schechter Corp.* v. *United States,* in support of the constitutionality of the National Recovery Act. In that case the argument was, not that a single industry was demoralized, but that all industry was demoralized; that producers were receiving inadequate prices, resulting in inadequate returns, and that workers were receiving insufficient wages, resulting in a reduction of purchasing power and in the creation or continued existence of social evils calculated to produce disorder and unrest; that these conditions affected interstate commerce and could be remedied only by the Federal Government, since the States, acting by themselves, were powerless to meet the situation. All of these arguments were rejected by the Court, either directly or by necessary implication. The parallel between the basic contentions of the Government in this case and in that case is demonstrated by the following excerpt from the reporter's analysis of the argument for the United States in that case:

> "It is submitted that what practices and conditions materially affect interstate commerce, so as to be within federal control, is a question of fact. Trade practices and labor conditions, which in normal times would have only an indirect and incidental effect upon interstate commerce, may substantially burden interstate commerce during a period of overproduction, cutthroat competition, unemployment, and reduced purchasing power. * * *"
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> * * *
>
> "The provisions of the Code are supported also on an independent ground: they are in one aspect part of a comprehensive effort by Congress to remedy the breakdown of interstate commerce which culminated in 1933. In this view, practices which

contribute to a sharp decline in wages, prices and employment, contribute to a frustration of commerce among the States and are subject to federal regulation in the interest of protecting and promoting that commerce. *Atchison, T. & S. F. Ry. Co.* v. *United States,* 284 U. S. 248, 260; *Appalachian Coals, Inc.* v. *United States,* 288 U. S. 344, 372.

"Congress alone could deal effectively with the causes contributing to the breakdown of interstate commerce. Nor could the situation have been met by separate action of the States. It would have been impossible to obtain prompt and uniform action by the individual state legislatures; and applied to interstate commerce, their legislation would be invalid. *Baldwin* v. *Seelig, Inc.,* 294 U. S. 511."

* * *

"* * * Congress must have power to deal with activities and practices which, because of their widespread character and effect, contribute substantially to the impairment of interstate commerce as a whole."

* * *

"The contention is not that Congress may control any form of activity which may conceivably to some degree affect interstate commerce, or that an economic crisis confers such power. The contention rests upon the facts. The depressed state of the national economy made it evident that interstate commerce was demoralized and endangered by acts which under other conditions might not seriously affect it. * * *"

"An additional basis on which the wage and hour provisions rest is that they are reasonable means for the prevention of labor disputes arising out of those subjects, and so are adapted to protecting interstate commerce from the burdens caused by labor disturbances. * * *" (pp. 512-514).

The Government's argument in support of the validity of the regulation of this single industry is, therefore, basically the same as that addressed to the Court in support of the power sought to be exercised in the National Recovery Act over all industry. There is, however, one important distinction, which makes the instant case an infinitely weaker case for the Government than was the *Schechter* case. In that case the demoralization of all industry, which gave rise to the enactment of that statute, had actually reduced the volume of interstate commerce, whereas in this case the evidence of "economic facts" relied upon by the Government shows that the conditions prevailing in the industry, and which it is the purpose of this Act to cure, have not affected the volume of coal moving in interstate commerce but only the distribution of its production among the several producing states, and this not as a result of monopolistic practices or artificial restraints, but as a result of the free play of competition among producers in keen rivalry with each other.

If in a time of nation-wide depression Congress, for the purpose of stimulating industrial activity, may not assume control over all industry, clearly it may not assume such control for the purpose of increasing that share of the national income to be derived by those engaged in a single industry, whether producers or workers, because believed by Congress to have been chronically insufficient over a period of years. If it may, Congress thus becomes the guardian of all industry and the sole judge of the time and circumstances under which it may assume such guardianship. Planned economy and full and complete paternalism in respect of all our economic activities awaits only an Act or series of Acts of Congress to be made effective. But this cannot be so. However distressing

conditions in an industry may be, whether it be coal or agriculture, the Constitution does not confer upon Congress the power to wrest control of that industry from its owners solely because they have not been able to make a success of it, whether their failure be due to their own incompetence or to economic causes beyond their control.

Insofar as the argument is predicated not upon the condition of the industry but upon its relation to our national economy, there is no substantial distinction between the coal industry and any other. Coal is no more of a national necessity than wheat, corn, cotton, cattle, iron ore and its products, salt, oil, clothing and many other articles that could be named. As in respect of coal, the predominant production of each of these is confined within a few States, while their consumption is nation-wide (Pl. Ex. 81-81X, R. 966-983). To sustain the power asserted upon this ground would be to sustain the power of Congress to regulate piecemeal, one by one, substantially every productive industry in the country—for there is none in respect of which the same relation between productive and consumptive States does not exist. Thus, by a series of Acts, Congress would be enabled to exercise the power specifically denied to it in the *Schechter* case when attempted through the enactment of a single law pertaining to all industry.

7. None of the objects and purposes of the Act, as evidenced either by the Act itself or by the economic facts relied on, bears any reasonable relation to the regulation of interstate commerce, but, on the contrary, they conclusively negative the existence of such relation.

The Act may not be sustained as one having for its purpose the removal of "burdens" or "restraints" upon

interstate commerce, or "obstructions" thereto. This is so because the economic facts relied on fail to disclose the existence of any such.[1]

It is true that the trial court in certain of its ultimate findings of fact found the existence of burdens, obstructions and restraints (FF. 180, 181, 182, 184, R. 210-212). These findings, excepted to by the petitioner (R. 239), are unsupported by and contradictory to both the evidentiary findings and the evidence itself, as appears from the summary review of the evidence in the statement, at pp. 7-9, *ante,* and in the more detailed Review of the Evidence, at pp. 28-62, *ante.*

But it is unnecessary to go either to the evidentiary findings or the evidence to show that these so-called ultimate findings of fact in respect of "burdens", "restraints" or "obstructions" are entitled to no consideration. On their face, and when read in the light of other findings of ultimate fact upon which they depend, they are clearly based upon a misconception of what constitutes a "burden", "restraint" or "obstruction" in the legal and constitutional sense.

What is a "burden" or "restraint" upon interstate commerce or an "obstruction" thereto in a legal and constitutional sense is in the last analysis a question of law and not of ultimate fact, although its determination will depend upon questions of fact. That this is so is evident from a consideration of the inherent limitations of the interstate commerce power itself, which is not the equivalent of a power to regulate any and all matters "affecting" interstate commerce.[2] It is evident from a consideration of the

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[1]See Statement, pp. 7-9, *ante;* and Review of Evidence, pp. 28-62, *ante.*

[2]*Schechter Corp.* v. *United States,* 295 U. S. 495.

Acts passed under the commerce power—notably the Anti-Trust Acts—and the cases interpreting the same. The Sherman Act in terms forbids any contract, combination or conspiracy "in restraint of" interstate commerce. Under such Act what is a restraint is a question of law. Not every restraint is within the Act. An ultimate finding of fact by a district court in an anti-trust case that a given contract or combination restrained interstate commerce would be without legal significance on appeal as a finding of fact. The question on appeal, as below, would be whether the facts relied on to support such conclusion established the existence of a "restraint" upon interstate commerce in the legal and constitutional sense.

Similarly what constitutes an "obstruction" to or "interference" with interstate commerce is a question of law and not one of ultimate fact, although dependent upon the evidentiary facts. A strike resulting in complete stoppage of production at a mine and in the destruction of the mine itself results in an "obstruction" to, or interference with, interstate commerce by preventing and destroying it. But since the effect upon interstate commerce in such case is indirect and not direct, the resulting obstruction or interference is not an obstruction or interference within a legal or constitutional sense.[3] This and other kindred cases,[4] although involving questions of statutory interpretation only, were held by the Court in *Schechter Corp.* v. *U. S.*, *supra*, as expressive of constitutional limitations as well.

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[3]*United Mine Workers* v. *Coronado Coal Co.*, 259 U. S. 344.

[4]*United Leather Workers* v. *Herkert*, 265 U. S. 457; *Industrial Association* v. *United States*, 268 U. S. 64; *Levering & Garrigues Co.* v. *Morrin*, 289 U. S. 103.

On their face, and read in the light of other findings of ultimate fact upon which they depend, it is obvious that the findings referred to are based upon the erroneous assumption that diversions of tonnage from one district to another (resulting from the play of free competition, and referred to in the findings, in the answer of the Government, in the evidentiary findings and in the findings of fact as "dislocations"), constitute a burden or restraint upon interstate commerce. On the contrary, they are, of course, the normal result of free competition.

All of the findings (FF. 180, 181, 182 and 184, R. 210-212) in which the words "burden," "restraint," and "obstruction" occur purport to set o[illegible]ect of "destructive competition". They must, therefore, be read in the light of the immediately preceding findings (FF. 178, 179, R. 210) in which "destructive competition" and its nature and cause are set forth. Reading all these findings altogether, as they must be, they amount to this:

1. That "unrestrained and destructive competition" has existed in the industry for many years (FF. 178, R. 210). This is equivalent to a finding of the absence of monopolistic control or artificial restraint and of the existence of uncontrolled and "unrestrained" competition.

2. That these "competitive conditions * * * have led to *destructive price cutting*" resulting in the receipt of inadequate prices by producers (FF. 179, R, 210). This is again an affirmative finding of the existence of the free play of competition and of its effect upon profits, not upon interstate commerce.

3. That "such *destructive price cutting*" (*i.e.*, that described in Findings 178 and 179) has caused "substantial diversions" of tonnage or so-called "dislocations." But diversions from one producing area to another are the com-

mon and necessary result of the free play of competition in an industry where, as found with respect to the coal industry, such competition is severe and unrestrained. In so far as these are said to constitute "dislocations" of the "normal flow" of commerce the finding is without support in the record. There is no evidence and could be none as to such "normal flow". It is not, of course, the function of the Federal Government under the Commerce Clause to determine how much coal shall be supplied from one field as against another. Diversions due to the free play of competition do not constitute burdens or restraints upon, interferences with, or obstructions to interstate commerce or "dislocation" of its "normal flow." These are mere words, indicative of the free play of competition and of the absence of burdens and restraints.

4. That "such unrestrained and destructive conditions" have given rise to "unfair practices" serving "to further demoralize the industry" (FF. 181; R. 210).

5. That "disparities" in wages rates in competing areas of production resulting in "disparities in prices" have resulted in *diversions* of tonnage from one competing area to another and *consequently* in burdening, restraining and obstructing interstate commerce (FF. 182; R. 211). This is only another way of saying that free and unrestrained competition in the industry has given rise to "disparities in wage rates", resulting in "disparities in prices", and thereby affecting the proportion of tonnage moving from one district or another under the free play of competition. But this result is in no legal sense a burden or restraint upon interstate commerce. On the contrary, it discloses a lack of restraint. And, as we have repeatedly said, the complaint is not of the existence of artificial restraints but that competition is too free. Moreover, in so far as diversions of tonnage are due to "disparities in wage rates" they are beyond

the power of Congress to control as a "burden", "restraint", "obstruction" or interference with interstate commerce,[1] as the trial court itself recognized in holding the labor provisions of the Act to be unconstitutional.

6. That "such unrestrained and destructive competition * * * and the cutting of wage rates before described" have resulted in strikes, suspension of work and interruption and obstructions to interstate commerce (FF. 184, R. 211-212). This is no more than a finding that when there is a suspension of work due to strikes or other causes interstate commerce from the mine affected ceases; but the resulting "interruption" is not an "obstruction" or interference with interstate commerce in the legal and constitutional sense[2], as the trial court recognized in declaring invalid the labor provisions[3].

It is obvious, therefore, upon the face of each of these findings itself, when read in the light of the preceeding findings descriptive of what is meant by "destructive com-

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[1]*Schechter Corp.* v. *United States*, 295 U. S. 495.

[2]*Schechter Corp.* v. *United States, supra; United Mine Workers* v. *Coronado Coal Co.*, 259 U. S. 344; *United Leather Workers* v. *Herkert*, 265 U. S. 457; *Industrial Association* v. *United States*, 268 U. S. 64; *Levering & Garrigues Co.* v. *Morrin*, 289 U. S. 103.

[3]This same finding (FF. 184, R. 211) contains the statement that such strikes "have caused violent and wide fluctuations in the price of bituminous coal to the consuming public." This finding of so-called ultimate fact is directly contrary to the court's evidentiary findings (FF. 97-99, R. 162-163) from which it appears that there have been no violent fluctuations since the early part of 1923, and that from 1926 to 1934 (FF. 99, R. 163) coal prices have fluctuated less than either "the average of all commodities or the average of all raw materials or of the following specific commodities: Non-ferrous metals, petroleum products, lumber, cotton goods, and hides and skins." Only during the war period and the immediate post war period, both wholly abnormal, have there been any wide fluctuations in the price of coal for 35 years (R. 1002). But assuming there were, it is difficult to perceive upon what theory Congress could assume regulation and control of productive industry to prevent the reourrence of wide or violent fluctuations in price due to the free play of competition.

petition", or price cutting, that the court below proceeded upon the erroneous assumption that diversions of tonnage resulting from the free play of competition or inadequacy of prices or wages due to the same cause or interruption of movement due to labor disputes, constitute "burdens" or "restraints". This is a new conception of these words, utterly contrary to previous decisions of this Court. Moreover, if the existence of such consequences may be the predicate for Federal regulation of industry, it is obvious that it has no limits and may be exercised in any case where Congress is of the opinion that the geographical distribution of interstate sales, resulting from the play of free competition, is inequitable, or that the prices received are inadequate, or that labor disputes or the potentiality of labor disputes have or may interrupt the movement of commerce. Congress is, of course, possessed of no such power. It thus appears that the court in its findings was proceeding upon a wholly erroneous conception of the law in trying to justify its decision upon the power of Congress to remove burdens or restraints to interstate commerce. On the contrary the ultimate findings disclose the complete absence of "burdens," "restraints," or "interruptions," as these words are understood either in law or in trade.

Neither may the Act be sustained as one to promote, foster and protect interstate commerce. The purpose is not to promote, foster and protect interstate commerce from any evil of any description whatsoever, but to promote the interests of persons engaged in the production of coal, a part of which is sold in interstate commerce. This is not a protection of interstate commerce but an act designed to improve the economic well-being of persons engaged in an industry. If, under the guise of regulating interstate commerce, Congress may seize upon the coal industry and regulate its activities for that purpose, then clearly it may equally seize upon any other industry similarly en-

gaged in the production of goods, thereafter finding their way, in part, in interstate commerce, and regulate its activities. Neither the regulation nor promotion of interstate commerce, as such, is the purpose of this statute. Its object is to regulate productive industry, in which interstate commerce is now free, by subjecting its operations to Federal control. There is neither finding nor evidence that one additional ton of coal will move in interstate commerce under the provisions of this Act than before its passage, or that one additional ton of coal will be mined and offered for sale in such commerce. On the contrary, the effect of the statute, if any, will be to reduce the volume of coal produced and moved in interstate commerce through increases in price tending to the substitution of other fuels and increased fuel burning efficiency (FF. 53-55, R. 134-136, FF. 75, R. 146-147; Pl. Exs. 22-34, R. 817-865).

After all the weeks consumed in the taking of testimony, the record is barren of the existence of restraints, burdens, obstructions, interruptions, or any factor whatsoever, the eradication of which would promote interstate commerce in coal. What the record is full of is evidence of an overexpanded industry, in which the keenest competition exists, as a result of which the economic well-being of those engaged therein is not as satisfactory as might be wished. But Congress is possessed of no general welfare power. It may not, under the guise of regulating interstate commerce, seek to control the productive activities of the people in the various States for the purpose of improving their economic well-being. Such power, if to be exercised by government at all, must be exercised by the State, and to the extent not possessed by the State Government has been reserved to the people, to be exercised by them, if occasion requires, through amendments to State or Federal Constitutions.

What has been said is sufficient to dispose both of ultimate findings of fact and of the evidence of record in so far as they pertain to burdens and restraints upon interstate commerce in the ordinary sense of the word.

It remains only to consider the legal effect of the "unfair competitive practices" referred to in FF. 181 (R. 210) as the result of "unrestrained and destructive competitive conditions". As appears from this finding the practices referred to are those set forth in Finding 166. That finding (R. 207) is a finding of the past and present existence of practices described in paragraphs 2 to 12, inclusive, of subsection (i) of Part II of Section 4 of the Act. In the same finding the court found that such practices "are not and have not been engaged in by reputable firms and are not and have not been the general practice." It also found that "similar practices existed and exist in other industries."

The pursuit of such practices, whether constituting a burden or restraint in the legal and constitutional sense or not, is no warrant for the enactment of a statute assuming complete control over the industry itself. The practices referred to (Section 4, Part II; paragraph (i)) relate to various devices employed for the purpose of underselling a competitor. Assuming for the sake of argument, that all the practices described are within the power of Congress to control under the Commerce Clause, they may be eradicated by appropriate legislation confined to that purpose. This Congress has done by prohibiting their use pursuant to the unfair practice provisions of the Act (Sec. 4, Part II, par. (i)), and it clearly exhausted its power by such prohibition, assuming *arguendo* that it had any. The existence of some competitive practices of the type proscribed cannot be made a predicate upon which to support the re-

maining provisions of the Act seeking to bring the industry within a complete scheme of Federal regulation. Regulation of wages and prices has neither a reasonable relation to unfair practices in interstate commerce, nor would they be a means reasonably adapted to the removal of such practices. On the contrary, regulation of wages and prices would in themselves not put an end to such practices. Such practices, to the extent that they may be within the reach of the commerce power, may be adequately dealt with by themselves. Their existence cannot be made the excuse for an invasion of the rights reserved under the Tenth Amendment through the attempted subjection of the whole industry, in all its aspects, to Federal regulation.

This argument receives added force when it is recalled that the Court found that "similar practices existed and exist in other industries" (FF. 166, R. 207). If the existence of such practices, therefore, may be made the predicate for Federal regulation of this industry, there is no limit to its exercise. It is therefore unnecessary to consider the practices prohibited one by one for the purpose of determining whether or not each is within the power of Congress to prohibit under the commerce clause. The evils resulting therefrom may be corrected, as they have been, by direct enactment. Regulation of the industry, including regulation of labor relations and prices is neither necessary nor appropriate for this purpose and cannot be based upon the existence of such practices.

The statute, therefore, may not be sustained as one having for its purpose the removal of "burdens or restraints upon interstate commerce or obstructions thereto" since the economic facts relied on in support of the statute fail to disclose the existence of any such. On the contrary the purpose of the statute is to create restraints upon the free flow of interstate commerce, by legislative fiat, in order to "stabilize" the industry.

POINT III

THE LABOR PROVISIONS OF THE ACT ARE INVALID.

1. The wage and hour provisions of the Act are not within the Commerce Clause.

The statute requires that all producers subscribing to the Code shall observe wages and hours determined in accordance with the provisions of the Act, the inclusion of which within the Code is made mandatory upon the Commission (Sec. 4, Part III (g), Appendix, pp. *24-25*, fols. 91-93).

The Act provides that hours of labor agreed upon by operators representing two-thirds of the national tonnage and miners representing fifty per cent. of the total number of miners within the country as a whole shall be observed by all producers, whether parties to such agreement or not (Sec. 4, Part III(g), Appendix, pp. *24-25*, fols. 91-93). It further provides that the wages to be paid by all producers in any given district shall be those agreed upon by producers representing two-thirds of the tonnage in such district and miners representing fifty per cent. of the total number of miners in such district (*Id.*). In other words, every coal producer in the United States is required to observe wages and hours as determined by agreement between the requisite proportion of producers and miners set forth in the statute, and every miner in the United States is required to accept the wages so fixed and to observe the hours so determined, whether a party to such agreement or not. Obedience to these provisions is sought to be compelled, upon the part of the producers, by the penalty tax prescribed

in Section 3 of the Act (Appendix, pp. 6-7, fols. 18-22). Only those producers conforming to such provisions may escape the payment of such penalty tax, and only so long as they observe them. Any producer found by the Labor Board established under the labor provisions of the Code to have violated such wage and hour regulations becomes immediately subject to expulsion from the Code (Sec. 5(b), Appendix, pp. 25-26, fols. 94-98) and to payment of the penalty tax, whether expelled or not (Sec. 3, Appendix, pp. 6-7, fols. 18-22). The Act, therefore, seeks to subject to Federal regulation wages to be paid and hours to be worked throughout the industry.

That Congress is without power to regulate wages and hours in productive industry was authoritatively decided by this Court in *Schechter Corp.* v. *United States*, 295 U. S. 495. Notwithstanding this decision and prior decisions of the Court, leading to the same conclusion, the Government, in the court below, urged that the wage and hour provisions of the Act were within the power conferred upon Congress by the Commerce Clause. These arguments will without doubt be renewed in this Court:

1. The Government, in the court below, sought to distinguish the *Schechter* case upon the ground that the activities in which the defendants were engaged in that case were strictly local in character, since it appeared that interstate commerce had ceased in the articles in respect of which the labor therein sought to be regulated was performed. It is plain, however, that the decision of the Court was predicated upon no such narrow ground. It was based primarily upon the proposition that the effect of wages and hours upon interstate commerce is indirect only, and hence beyond the power of Congress to regulate.

The Court said:

"In determining how far the federal government may go in controlling intrastate transactions upon the ground that they 'affect' interstate commerce, there is a necessary and well-established distinction between direct and indirect effects. The precise line can be drawn only as individual cases arise, but the distinction is clear in principle. Direct effects are illustrated by the railroad cases we have cited, as *e.g.*, the effect of failure to use prescribed safety appliances on railroads which are the highways of both interstate and intrastate commerce, injury to an employee engaged in interstate transportation by the negligence of an employee engaged in an intrastate movement, the fixing of rates for intrastate transportation which unjustly discriminate against interstate commerce. But where the effect of intrastate transactions upon interstate commerce is merely indirect, such transactions remain within the domain of state power. If the commerce clause were construed to reach all enterprises and transactions which could be said to have an indirect effect upon interstate commerce, the federal authority would embrace practically all the activities of the people and the authority of the State over its domestic concerns would exist only by sufferance of the federal government. Indeed, on such a theory, even the development of the State's commercial facilities would be subject to federal control. As we said in the *Minnesota Rate Cases*, 230 U. S. 352, 410: 'In the intimacy of commercial relations, much that is done in the superintendence of local matters may have an indirect bearing upon interstate commerce. The development of local resources and the extension of local facilities may have a very important effect upon communities less favored and to an ap-

> preciable degree alter the course of trade. The freedom of local trade may stimulate interstate commerce, while restrictive measures within the police power of the State enacted exclusively with respect to internal business, as distinguished from interstate traffic, may in their reflex or indirect influence diminish the latter and reduce the volume of articles transported into or out of the State.' See, also, *Kidd* v. *Pearson,* 128 U. S. 1, 21; *Heisler* v. *Thomas Colliery Co.,* 260 U. S. 245, 259, 260" (pp. 546-547).

Moreover, wages and hours are an incident of production and not of commerce, whether the article of commerce in respect of which the labor involved is performed is an article produced for subsequent movement in interstate commerce or one which has come to rest in the State and is being prepared for further use as an article of State commerce. This is so because production is not commerce, but the mere preparation of articles for the commerce therein which may follow. In a long line of decisions preceding the *Schechter* case the Court held that the production of articles intended for subsequent movement in interstate commerce was not subject to regulation by the Federal Government[1]. These cases included mining as well as other operations. In three of these cases the question was whether the mining of coal was interstate commerce and as a consequence was within the reach of the com-

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[1] *Kidd* v. *Pearson,* 128 U. S. 1; *Hammer* v. *Dagenhart,* 247 U. S. 251; *United Mine Workers* v. *Coronado Coal Co.,* 259 U. S. 344; *Heisler* v. *Thomas Colliery Co.,* 260 U. S. 245; *Oliver Iron Co.* v. *Lord,* 262 U. S. 172; *Delaware, Lackawanna & Western R. R. Co.* v. *Yurkonis,* 238 U. S. 439; *United Leather Workers* v. *Herkert,* 265 U. S. 457; *Utah Power & L. Co.* v. *Pfost,* 286 U. S. 165; *Champlin Refining Co.* v. *Commission,* 286 U. S. 210; *Chassaniol* v. *Greenwood,* 291 U. S. 584.

merce clause[2], and in a fourth the same question was presented in respect of iron ore[3]; and in each of the cases the Court held that such mining was not interstate commerce. The distinction sought to be made is, therefore, inconsistent not only with the *Schechter* case itself but with all prior decisions of this Court.

2. The Government also contended below that the regulation of wages and hours in the coal industry was subject to Federal regulation because it was said wages constituted 60% or 65% of the total cost of production, and were hence the controlling element in the determination of price, which in turn affected the volume and distribution of coal produced. The same argument was made and rejected in the *Schechter* case. In that case it was earnestly insisted that since prices affected the volume and distribution of interstate commerce, and wages and hours affected prices, wages and hours were, therefore, within the power of Congress to regulate under the Commerce Clause. In that case, as in this, the Government sought to extend the operation of the Commerce Clause to activities that "affected" interstate commerce. This argument was rejected by the Court and is equally without force here. It may be noted in passing that in that case it appeared that 50-60% of the operating costs of the defendants was represented by wages (295 U. S. 548). The power of the Federal Government is not to be determined by the degree to which wages and hours affect prices, but by the manner in which they are affected. The primary question is one of power. And, as pointed out in the opinion in the *Schechter* case, if Congress may

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[2]*United Mine Workers* v. *Coronado Coal Co., supra; Heisler* v. *Thomas Colliery Co., supra; Delaware, Lackawanna & Western R. R. Co.* v. *Yurkonis, supra.*

[3]*Oliver Iron Co.* v. *Lord, supra.*

control one element of cost affecting price, and hence affecting interstate commerce, it may control all elements of cost, and hence assume complete control of the processes of production. The Court said:

> "The argument of the Government proves too much. If the federal government may determine the wages and hours of employees in the internal commerce of a State, because of their relation to cost and prices and their indirect effect upon interstate commerce, it would seem that a similar control might be exerted over other elements of cost, also affecting prices, such as the number of employees, rents, advertising, methods of doing business, etc. All the processes of production and distribution that enter into cost could likewise be controlled. If the cost of doing an intrastate business is in itself the permitted object of federal control, the extent of the regulation of cost would be a question of discretion and not of power". (p. 549).

The question is not as to the extent to which wages and hours, or any other item of cost, affect total cost or price, but whether the effect upon interstate commerce is direct or indirect. That it is equally indirect, whether the element of cost sought to be regulated represents a large or small proportion of cost, is clear. The power of Congress under the Commerce Clause does not depend upon the degree to which the activity sought to be brought within Federal regulation affects interstate commerce, but upon the manner in which it affects it. Since the regulation of production is not within the Commerce Clause (see cases footnote 1, p. 116, *ante*), and since the regulation of wages and hours is a regulation of production, the relation between the wages paid in a given industry and the total

cost of producing the articles produced by such industry is wholly immaterial.

3. It was argued below that Congress might regulate wages and hours in the coal industry for the purpose of avoiding interruptions to the movement of interstate commerce by preventing labor disputes causing such interruptions. The same argument was made (Argument for the United States, 295 U. S. at 514) and rejected in the *Schechter* case. Indeed, if Congress may regulate wages and hours in the coal industry for this reason, it may regulate wages and hours in all industries. The possibility of interruption to commerce by reason of such disputes is equally present in all, as shown by this record (FF. 135, R. 190; Pl. Ex. 75, 75A, R. 954B-954C). Moreover, this Court has repeatedly held that interruption to interstate commerce on account of labor disputes directly affecting local activities alone, and only indirectly affecting interstate commerce, is not within the reach of Federal power.[4] While these cases involved primarily the interpretation and application of the Sherman Act, the Court, in its opinion in the *Schechter* case, made it plain that the test was the same in respect of the extent of constitutional power.

Speaking of these cases and applying them to the argument that Congress may regulate wages and hours for the purpose of preventing stoppage of interstate commerce arising out of labor disputes, the Court said:

> "In the case last cited [*Levering & Garrigues* v. *Morrin, supra*] we quoted with approval the rule

[4] *United Mine Workers* v. *Coronado Coal Co.*, 259 U. S. 344; *United Leather Workers* v. *Herkert*, 265 U. S. 457; *Industrial Assn.* v. *United States*, 268 U. S. 64; *Levering & Garrigues Co.* v. *Morrin*, 289 U. S. 103.

that had been stated and applied in *Industrial Association* v. *United States, supra,* after review of the decision, as follows: 'The alleged conspiracy and the acts here complained of, spent their intended and direct force upon a local situation,—for building is as essentially local as mining, manufacturing or growing crops,—and if, by a resulting diminution of the commercial demand, interstate trade was curtailed either generally or in specific instances, that was a fortuitous consequence so remote and indirect as plainly to cause it to fall outside the reach of the Sherman Act.' "

"While these decisions related to the application of the federal statute, and not to its constitutional validity, the distinction between direct and indirect effects of intrastate transactions upon interstate commerce must be recognized as a fundamental one, essential to the maintenance of our constitutional system. Otherwise, as we have said, there would be virtually no limit to the federal power and for all practical purposes we should have a completely centralized government * * *" (pp. 547-548).

Interference with, or prevention of, production by reason of labor disputes, although indirectly affecting interstate commerce, may not be made the predicate of action by Congress.

4. Neither may Congress regulate wages and hours for the purpose of increasing the purchasing power, social security or standards of living of employees engaged in the production of articles subsequently to move in interstate commerce. This argument was also made and rejected in the *Schechter* case. Such objects, so far as within the power

of government to promote, rest wholly within the control of the States. This is so because the accomplishment of such objects only indirectly affects interstate commerce, and is primarily the concern of the States. It is so for the more fundamental reason that so to interpret the Commerce Clause would be equivalent to converting it into a general welfare clause whereby power to legislate generally for the promotion of economic and social welfare within the States would rest with the Federal Government. No such power was conferred or sought to be conferred.

5. Equally unavailing is the argument that only the Federal Government, by Federal regulation, can bring about that uniformity of wages and hours or relation of wages and hours among producing districts necessary to prevent producers in one State from obtaining an advantage in interstate markets over producers of another State paying lower wages or working their employees longer hours. This argument, like all others made by the Government in the court below, was made and rejected in the *Schechter* case. It is an argument equally applicable to all productive activity. It is an argument which, carried to its logical conclusion, would convert the Federal Government from one of delegated and enumerated powers to one capable of exercising complete control over the economic life of the several States. It is based upon the false assumption that the Constitution attempted to confer upon the Federal Government plenary power to legislate for all the States in all matters in which uniformity of practice might appear to Congress at any time to be desirable in the national interest.[5] No such power was conferred or intended to be

[5] *Kansas* v. *Colorado*, 206 U. S. 46, 89-91.

conferred.[6] Had it been intended to be conferred, the careful enumeration of powers conferred upon the Federal Government would have been wholly unnecessary. Under this theory, Congress could at any time assume control of any activity carried on within the States in any manner affecting interstate commerce, and hence regulate all productive industry. Under all of the decisions of this Court, as well as under the fundamental scheme of government embodied in the Constitution, Congress is without such power.

As stated in the *Schechter* case, referring to the necessity of limiting the interference of the Congress with intrastate activities to such only as directly affect interstate commerce:

> "While these decisions [under the Anti-Trust Acts] related to the application of the federal statute, and not to its constitutional validity, the distinction between direct and indirect effects of intrastate transactions upon interstate commerce must be recognized as a fundamental one, essential to the maintenance of our constitutional system. Otherwise, as we have said, there would be virtually no limit to the federal power and for all practical purposes we should have a completely centralized government. We must consider the provisions here in question in the light of this distinction" (295 U. S. at p. 548).

2. The wage and hour provisions are invalid as an unauthorized delegation of legislative power.

Under the Act, power to determine wages and hours to be observed by all producers in the industry is delegated

[6] See Debates in Constitutional Convention discussed in Point V, *post*.

to the stated percentages of operators and miners agreeing thereon (Sec. 4, Part III(g), Appendix, pp. *24-25*, fols. 91-93). This is a clear delegation of legislative power and in itself is sufficient to render the provisions unconstitutional since no standard whatsoever is prescribed.[1]

Not only is no standard prescribed, but the delegation is not to public officers but to private persons, constituting a further reason why these provisions of the Act are void as an unauthorized delegation of power.

Unlike the National Industrial Recovery Act, under which the codes did not take effect until they had received the *imprimatur* of the President,[2] insofar as wages and hours are concerned, the Guffey Act requires no executive action by any duly appointed officer of the Federal Government. As pointed out in the *Schechter* case,[3] the cases are clearly distinguishable in which the Congress has relied upon private citizens with respect to local or trade customs[4] or with respect to regulations of a purely technical nature.[5] Under the Constitution, the executive power must be invested either in (1) primary officers whom the President shall have nominated, and by and with the advice and consent of the Senate appointed, or (2) inferior officers appointed either by the President alone or by the Courts of Law or by the heads of depart-

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[1]*Schechter Corp.* v. *United States*, 295 U. S. 495, 530; *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 414.

[2]*Cf. Schechter Corp.* v. *United States*, 295 U. S. 495, 529, and concurring opinion at pages 551 552.

[3]295 U. S. 495, at page 537.

[4]*Jackson* v. *Roby*, 109 U. S. 440, 441; *Erhardt* v. *Boaro*, 113 U. S. 527, 535; *Butte City Water Co.* v. *Baker*, 196 U. S. 119, 126.

[5]*St. Louis & Iron Mountain Ry. Co.* v. *Taylor*, 210 U. S. 281, 286.

ments.[6] As said in *Ekiu* v. *United States,* 142 U. S. 651, 663:

> "The Constitution does not allow Congress to vest the appointment of inferior officers elsewhere than 'in the President alone, in the courts of law or in the heads of departments'."

There is a wealth of authority in the state decisions denying to the legislatures the power to delegate to private citizens.[7] This Court has recognized the same principle in invalidating municipal ordinances on the ground of repugnance to the Fourteenth Amendment in requiring action upon the request of two-thirds of the property owners concerned, the Court holding that in such cases the owners

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[6]Article II, Section 1, Clause 1, of the Constitution:

> "The executive Power shall be vested in a President of the United States of America."

Article II, Section 2, Clause 2:

> "He shall * * * nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law or in the Heads of Departments."

[7]*Shumway* v. *Bennett,* 29 Mich. 451, 465; *Elliott* v. *Wille,* 112 Neb. 78, 89; *Morton* v. *Holes,* 17 N. Dak. 154, 159; *State ex rel. Jackson* v. *School District,* 140 Kan. 171, 174-175; *State* v. *Crawford,* 104 Kan. 141, 143; *Rowe* v. *Ray,* 120 Neb. 118; *McCown* v. *Gose,* 244 Ky. 402; *State* v. *Withnell,* 78 Neb. 33; *State ex rel. Nehrbass* v. *Harper,* 162 Wis. 589; *Tilford* v. *Belknap,* 126 Ky. 244; *City of St. Louis* v. *Russell,* 116 Mo. 248; *City of St. Louis* v. *Howard,* 119 Mo. 41; *Hays* v. *Poplar Bluff,* 263 Mo. 516. Those cases are of course distinguishable in which the individual citizens may only *initiate* a petition for an improvement and lack the power to *require* it, the latter power being vested in an administrative body, just as under the N. I. R. A. the executive power remained in the President. *State* v. *Raub,* 106 Kan. 196; *Barrett* v. *City of Osawatomie,* 131 Kan. 50.

might withhold their consent wilfully, capriciously, selfishly or arbitrarily.[8]

3. The collective bargaining provisions of the Act are equally outside the Commerce Clause.

These provisions undertake to prescribe the method by which wages and hours shall be determined. But if determination of wages and hours themselves is outside the power of Congress because a regulation of production and not of commerce, a determination of the method is equally outside such power.

Texas & N. O. R. Co. v. *Ry. Clerks,* 281 U. S. 548, lends no support to the validity of the labor provisions of the Act relating to collective bargaining or otherwise. In that case the Court sustained the validity of an act regulating to a very limited extent the relations between interstate carriers and their employees. The decision is predicated upon the power of Congress to regulate such carriers. It affords no support for the proposition that, under the Commerce Clause, the Federal Government may regulate the labor relations of the employees of persons engaged in production, whether by way of manufacture or otherwise. To give it such effect would be inconsistent with the rulings of the Court in all of the cases cited above and with the recent decision in the *Schechter* case. Collective bargaining among employees and employers engaged in the production of articles of commerce may or may not be socially or economically desirable. The Federal Government is as much without power to regulate the labor relations of such persons in this respect as in the determination of wages and hours. This follows conclusively from the cases cited.

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[8]*Eubank* v. *Richmond,* 226 U. S. 137; *Seattle Trust Co.* v. *Roberge,* 278 U. S. 116; *Cf. Cusack Co.* v. *City of Chicago,* 242 U. S. 526, which was distinguished in the *Seattle Trust Co.* case.

POINT IV

SINCE THE LABOR PROVISIONS ARE INVALID AND THE CODE WAS SOUGHT TO BE ENACTED AS A WHOLE, THE ENTIRE REGULATORY SCHEME REPRESENTED BY THE CODE IS INVALID.

Section 4 of the statute provides that its provisions "shall be formulated by the Commission into a working agreement, to be known as the 'Bituminous Coal Code'" (Appendix, p. 7, fol. 23). It is to the Code thus prescribed, as a whole, that all producers must adhere to escape the payment of the penalty tax imposed by Section 3. The two main subdivisions of the Code are that regulating wages, hours and labor relations (R. 70-71) and that providing for the fixing of prices (R. 61-70). The labor provisions are clearly invalid (Point III, p. 113, *et seq., ante*) and the trial court so held (R. 1180-1181). Subsequent discussion herein will demonstrate that the price fixing provisions are likewise invalid (Points V and VI, p. 140, *et seq., post*). But the invalidity of *either* of such provisions invalidates the Code as a whole. In view of this, if the Court should be convinced that we are correct in our contentions as to the labor provisions, it will be unnecessary for the Court to give separate consideration to the price fixing provisions, which so considered present a wholly novel question in that they represent the first attempt upon the part of Congress, under the Commerce Clause, to fix the sale price of a commodity. Therefore, it seems appropriate before passing to a consideration of the price fixing provisions, taken independently, to explain why we believe that the invalidity

of the labor provisions renders all of Section 4, providing for the enactment of a Code, invalid without regard to the question as to the power of Congress to fix prices.

As already pointed out in Point II, p. 79, *et seq., ante,* this statute constitutes a plan or scheme for the regulation of the bituminous coal industry for the purpose of increasing the wages of miners and increasing the financial return of the operators, or some of them. If any provision of the statute which is essential to the accomplishment of that plan or scheme, or any substantial part thereof, is invalid, then the scheme as a whole must fall, for the Court cannot presume that the Congress would have legislated either for labor alone, or for the operators alone. While the statute contains the usual separability clause (Sec. 15, Appendix, p. 34, fol. 132), it is settled that separability provisions in the precise language of that contained in the present Act are merely aids in determining the legislative intent and not inexorable commands.[1] The effect of including such clauses in statutes is simply to reverse the presumption, which otherwise would be indulged in, of an intent that the Act should be wholly ineffective unless held to be validly operative as an entirety.[2] But the inclusion of a separability clause and the presumption thereby created does not authorize the Court to rewrite the statute and give it an effect altogether different from that sought by the statute viewed as a whole.[3] On the contrary, the statute as an entirety is invalid if there is a "clear probability that the invalid part

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[1] *Dorchy* v. *Kansas,* 264 U. S. 286; *Retirement Board* v. *Alton R. Co.,* 295 U. S. 330, 362.

[2] *Williams* v. *Standard Oil Co.,* 278 U. S. 235, 242; *Utah Power & Light Co.* v. *Pfost,* 286 U. S. 165, 184.

[3] *Retirement Board* v. *Alton R. Co.,* 295 U. S. 330, 362.

being eliminated, the legislature would not have been satisfied with what remains."[4]

It will be observed that the separability provision[5] does not in terms provide that the Code shall be separable, but only that the "provisions" of "the Act" shall be separable. The usual rule that mutually dependent provisions of a statute must fall if either is bad[6] has increased force when the provisions are found in the same section of the statute.[7] In the case of the Act before this Court, the Code appears *in toto* in a single section of the Act (Sec. 4, Appendix, pp. *7-25*, fols. 23-93),—convincing evidence that it was intended to operate as a whole. Moreover, Section 4 provides that "The provisions of *this section* shall be formulated by the Commission into a working agreement, to be known as the 'Bituminous Coal Code.'" (Appendix, p. *7*, fol. *23*). The Commission is thus given no authority to formulate a portion or portions of that section into a Code, and if it had been given such authority the statute in that respect would be clearly unconstitutional upon the grounds of improper delegation of legislative power, since it would

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[4] *Williams* v. *Standard Oil Co.*, 278 U. S. 235, 242. An inseparability clause creates only "a presumption that, eliminating invalid parts, the legislature would have been satisfied with what remained" (*Champlin Co.* v. *Commission*, 286 U. S. 210, 235). As pointed out in *Utah Power & Light Co.* v. *Pfost*, 286 U. S. 165, 184, the presumption created by the separability clause is overcome by considerations which show a "clear probability that the legislature would not have been satisfied with the statute unless it had included the invalid part".

[5] "Sec. 15. If any provision of this Act, or the application thereof to any person or circumstances, is held invalid, the remainder of the Act and the application of such provisions to other persons or circumstances shall not be affected thereby." (Appendix, p. *34*, fol. 132).

[6] *Allen* v. *Louisiana*, 103 U. S. 80, 84.

[7] *International Textbook Co.* v. *Pigg*, 217 U. S. 91, 112, 113.

have granted unlimited discretion to the Commission to determine what parts of the section should be placed in the Code and thereby becomes binding as law of the United States.[8]

The regulations of the Code are also so mutually interdependent that it cannot be supposed that the Congress would have enacted the statute had it lacked any of the present provisions of Section 4—certainly not without the price or labor provisions. Lacking any one of these regulatory provisions the Code either could not as a practical matter be enforced or, if enforced, would fail to effectuate the manifest intent of the Legislature.[9]

This is clearly so as to the wage provisions, for they are the heart of the Act, and, coupled with the collective bargaining provisions, constitute the means for effectuating one of the two major purposes, if not *the* major purpose, of the Act, *i.e.*, increasing the wages of the miners. It is true of this Act, no less than of the National Industrial Recovery Act, that "Wages and hours of labor are essential features of the plan, its very bone and sinew", and that "To take from this Code the provisions as to wages and the hours of labor is to destroy it altogether."[10]

The conclusion as to the predominant labor motive in the statute is confirmed by the voluminous evidence offered by the Government in respect of wage rates and living conditions at the mines (R. 428-448, 475-483, 494-502, 503-510, 510-517, 520-523, 523-528, 539-543; FF. 64-65, R. 140-141; FF. 79-82, R. 149-151; FF. 106-117, R. 166-

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[8]*Panama Refining Co.* v. *Ryan*, 293 U. S. 388; *Schechter Corp.* v. *United States*, 295 U. S. 495.

[9]*International Textbook Co.* v. *Pigg*, *supra*.

[10]*Schechter Corp.* v. *United States*, 295 U. S. 495, 554, 555.

178; FF. 124-125, R. 183-185; FF. 127-140, R. 186-192; FF. 142-144, R. 193-195; FF. 147-148, R. 197-198). The labor union, the United Mine Workers of America, was largely instrumental in the preparation and introduction in the Congress of the bills from which the Act originated (*Hearings before Sub-Committee of Committee on Ways and Means, House of Representatives, 74th Cong., 1st Sess., on H. R. 8479,* at pp. 26-28).

This is also confirmed by the language of the statute itself. Thus, the statute expressly states that the prices are to be fixed as provided in "order to sustain the stabilization of wages, working conditions, and maximum hours of labor" (Sec. 4, Part II(a), Appendix, p. *11,* fol. 38). It seems entirely clear, therefore, that as between the two the price provisions are enacted in aid of the labor provisions and not vice versa. But even if the reverse be true, it is certainly the fact that the fixing of prices and of wages are interdependent. The whole scheme of price fixing under the Act is based upon average costs of production for districts and price areas (Sec. 4, Part II(a)-(b), Appendix, p. *11,* fol. 38, pp. *13-14,* fols. 46-49). It was testified that cost of production is one of the most important factors in determining the coal producer's competitive position in any particular market (R. 340). And it was found that 60-65% of the producer's cost of production is the cost to him of his labor (FF. 64, R. 140). It must be perfectly apparent, therefore, that without the item of labor costs controlled there can be no "stabilization" effected in the industry, nor any effective control of price when the price itself is based upon labor costs. Government witnesses so testified (R. 481-482, 432-434, 441-442). The opening Section of the Act provides,

in part, that: "It is further recognized and declared * * * that the right of mine workers to organize and collectively bargain for wages, hours of labor, and conditions of employment should be guaranteed in order to prevent constant wage cutting and the establishment of disparate labor costs *detrimental to fair competition in the interstate marketing of bituminous coal* * * *" (Appendix, p. *3*, fols. 6-7).

At the very least, it is certainly true that the purpose of the Congress was to aid *both* labor and the operators, if not *primarily* labor, and the Court cannot sustain the statute in the one aspect if it be invalid in the other without doing violence to the Congressional intent.

POINT V

THE FACT THAT SALES OF BITUMINOUS COAL CONTEMPLATE AND RESULT IN INTERSTATE MOVEMENTS OF SUCH COAL DOES NOT AUTHORIZE THE CONGRESS TO FIX THE SALES PRICE.

PART I. The Question Presented as to the Scope of the Commerce Clause, and the Settled Rules of Constitutional Interpretation Applicable to its Solution.

PART II. The Power Asserted by the Government is Destructive of the Principle of Duality in our System of Government, and is Repugnant to the Tenth Amendment.

PART III. The History of the Formation, Adoption and Ratification of the Constitution, and Contemporary Expositions thereof, Establish that the Power Now Asserted Was Not Granted.

PART IV. The Decisions of this Court under the Commerce Clause Support and are Consistent with this View.

PART I

THE QUESTION PRESENTED AS TO THE SCOPE OF THE COMMERCE CLAUSE, AND THE SETTLED RULES OF CONSTITUTIONAL INTERPRETATION APPLICABLE TO ITS SOLUTION.

1. The absolute character of the power asserted by the primary argument in support of the price fixing provisions.

The primary argument, ultimately relied upon by the Government in the court below in support of the price fixing provisions,[1] is that the sale of coal f. o. b. mines for shipment to interstate destinations is a transaction "in" interstate commerce,[2] and that the fixing of its sales price, when thus sold for transportation across State lines, is a regulation of interstate commerce, and needs no further justification.[3] This may be the ground upon which the price fixing regulations of the instant statute were sustained by the court below.[4]

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[1]Notwithstanding the Government's insistence upon a trial as to "economic facts" (see p. 28, *ante*), the argument now to be treated was principally pressed in the court below in support of the validity of the price-fixing provisions under the commerce clause.

[2]*Flanagan* v. *Federal Coal Co.*, 267 U. S. 222.

[3]While the commerce power must be exercised in subordination to the protection which the Fifth Amendment accords to "private property" (*U. S.* v. *Cress*, 243 U. S. 316, 326) and to "fundamental personal rights" (*Carroll* v. *Greenwich Ins. Co.*, 199 U. S. 401, 410), it is obvious that there is neither private property nor personal right in selling goods across State lines, if the Government's view as to the scope of the interstate commerce clause be accepted.

[4]The opinion below may be read as accepting this absolute view and as referring to the "economic facts" only for the purpose of showing that price fixing is "reasonable"—*i.e.*, justified in the national interest (R. 1181-1195). Or the opinion (R. 1192) and the ultimate findings (R. 209-212) may be regarded as sustaining the price fixing provisions under the necessary and proper clause, as means reasonably related to the removal of burdens and obstructions from interstate commerce. The "burden and obstruction" argument is considered in Point VI, *post*.

The question is thus as to the scope of the power "to regulate Commerce among the several States".

Within this scope, that power acknowledges no restrictions or limitations other than those prescribed in the Constitution,[5] but is as plenary and absolute a power as the war power,[6] and the sole condition which the Government's argument would admit upon its exercise as now asserted, is that the commodity shall be moved, or shall be intended to be moved, across a State line.[7]

Neither the argument nor the statute acknowledge any limitation in respect of the nature of the commodity[8] or the volume or the manner of its movement.[9] There is no limitation as to uniformity, since the regulation of interstate commerce is not restricted in the Constitution by any such requirement,[10] and the Fifth Amendment cannot supply that lack since it contains no equal protection clause.[11] The public or private character of the business in which

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[5]*United States* v. *Joint Traffic Association*, 171 U. S. 505, 571.

[6]*Gibbons* v. *Ogden*, 9 Wheat. 1, 197.

[7]For the purpose of the argument upon this point, the fact that the statute applies to all coal sold, whether or not interstate movement of it is ever intended or ever occurs, is disregarded. The fact that it does so is independently sufficient to render the entire Act invalid (see Point VII, pp. 232-235, *post*).

[8]The court below found:

> "Coal is an innocuous commodity, the transportation of which in interstate commerce is not harmful to that commerce or to the public health, safety, morals or general welfare" (Finding 171, R. 208).

[9]The tax (Sec. 3, Appendix, pp. *6-7*, fols. 18-22) and the code (Sec. 4, Appendix, p. *7*, fol. 23) apply to *all* producers, and "producer" is defined to include "all persons * * * engaged in mining bituminous coal" (Sec. 19, Appendix, pp. *36-37*, fols. 140-141). The statute does not say "engaged in the business of mining bituminous coal" or engaged in it exclusively; and it applies equally whether the coal is moved by rail or truck or wagon, or carried in a sack on the back.

[10]*Clark Distilling Co.* v. *Western Maryland Ry. Co.*, 242 U. S. 311, 326, 327.

[11]*U. S.* v. *N. Y. N. H. & H. R. Co.*, 165 Fed. 742, 745, 746.

the commodity is produced or is to be used can supply no limitation, for the Federal power is not a power to regulate any business, whether "public" or private, but a power to regulate commerce, and that power, within its scope, operates irrespective of the ownership of the commodities affected.[12] Nor can it be said that the exercise of the power here asserted is conditioned upon proof that it be "reasonably" related to the promotion of the national general welfare, for the United States has no power to regulate for the general welfare,[13] and the only power of the Federal Government which is conditioned in that way is the taxing and appropriating power.[14]

Nor is it pertinent to the argument whether the present statute will in operation confine coal producing States, areas and mines to their existing markets, or reapportion and reallocate markets among them. The power asserted comprises alike its use to accomplish either result, and the courts are not concerned with the wisdom or justness of the result of the particular statute, but with the question of the existence of the power upon which it is asserted to be based.[15]

It is an absolute power that is asserted—a power which extends to the fixing of prices of all commodities whenever and however transported across State lines, solely because so transported. If the interstate commerce power has the

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[12]*Board of Trustees* v. *U. S.*, 289 U. S. 48, 57, 59.

[13]*Jacobson* v. *Massachusetts*, 197 U. S. 11; *U. S.* v. *Butler* (decided Jan. 6, 1936, p. 9).

[14]*U. S.* v. *Butler* (decided Jan. 6, p. 9). The statutory recital that the bituminous coal industry is "affected with a national public interest" (Sec. 1, Appendix, p. 2, fol. 3) is therefore plainly not germane on the fundamental question as to the scope of the interstate commerce power.

[15]*Home Bldg. & Loan Assn.* v. *Blaisdell*, 290 U. S. 398, 447, 448, 483; *United States* v. *Lanza*, 260 U. S. 377, 385; *Everard's Breweries* v. *Day*, 265 U. S. 545, 559.

scope claimed, the Federal power in respect of the movement of commodities from one State to another is as absolute as its power to control the entry of commodities from foreign nations into the United States, or to prohibit the importation of any commodity altogether, for any reason or for no reason.[16] The selling of goods across State lines becomes a privilege which the Federal Government may grant or withhold at will; which it may grant to one and withhold from another, for any reason or for none; or which it may condition upon the acceptance and observance of prescribed prices for goods so sold.[17]

2. The applicable rules of constitutional interpretation.

The interstate commerce clause does not in express terms confer the power to fix the price of commodities.[1]

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[16]See *Atlantic Cleaners & Dyers* v. *U. S.*, 286 U. S. 427, 434; *Board of Trustees* v. *U. S.*, 289 U. S. 48, 57; *The Abby Dodge*, 223 U. S. 166, 176, 177; *Brolan* v. *U. S.*, 236 U. S. 216, 218, 219, 222; *Weber* v. *Freed*, 239 U. S. 325, 329, 330; *Buttfield* v. *Stranahan*, 192 U. S. 470, 492.

[17]Upon this naked question of power, the voluminous evidence taken in the court below is, of course, irrelevant. The evidence was not taken upon this issue as to the scope of the commerce power, but upon the issue as to the existence of burdens and obstructions and as to the "reasonableness" of the statute under the Fifth Amendment, the Government stating, in insisting upon a factual trial, that: "In the view of these defendants the constitutionality of said Act *depends upon* the existence of the burdens, dislocations, restraints and interruptions to interstate commerce in bituminous coal specified in the separate defense set up in sub-division II of defendant's answer and upon the facts relative to the causes and effects thereof, as therein set forth, and also upon facts relative to the reasonableness under the due process clause of the Fifth Amendment of the regulatory provisions of the proposed coal code" (R. 48).

[1]As pointed out in *U. S.* v. *Sutherland*, 9 Fed. Supp. 204, W. D. Mo. 1934 (holding unconstitutional the price fixing provisions of the lumber code under N.R.A.), the clause does *not* read "The Congress shall have power to regulate commerce among the several States, *including the power to fix prices at which persons may sell in such commerce their property.*"

The present statute is the first instance in the 150 years of our history of an attempt to exercise the commerce power in that way.[2] Obviously, the language of the grant is no sufficient test as to the scope of the power intended to be conferred, especially in view of the settled rule that the same words may, according to intent, confer powers of different scope as used in different portions of the Constitution or even as used twice in the same granting clause.[3] The provisions of the Constitution are not to be subjected to "a severe literal construction, which would be better adapted to special pleadings"[4]; but the instrument must be construed as a whole, and each clause given a scope and extent consistent with the nature and objects of the Federal Union and the provisions of all other parts of the instrument.[5]

In the application of this rule, views as to the scope of the commerce clause inconsistent with the maintenance of the principle of duality in our Government, and the necessary effect of which would be destruction of the rights reserved to the States and to the people by the Tenth Amendment, have been repeatedly rejected by this Court.[6]

While the case must be considered "in the light of our whole experience and not merely in that of what was said

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[2]Price fixing of commodities has been attempted under the war power under the Lever Act. See *U. S.* v. *Cohen Grocery Co.*, 255 U. S. 81; *Highland* v. *Russell Car & Snow Plow Co.*, 279 U. S. 253, 261, 262.

[3]*Russell Co.* v. *U. S.*, 261 U. S. 514, 520, 521; *Atlantic Cleaners & Dyers* v. *U. S.*, 286 U. S. 427, 434; *Home Bldg. & Loan Assn.* v. *Blaisdell*, 290 U. S. 398, 427.

[4]*Ogden* v. *Saunders*, 12 Wheat. 213, 286; *Home Bldg. & Loan Assn.* v. *Blaisdell*, 290 U. S. 398, 428.

[5]*Prout* v. *Starr*, 188 U. S. 537, 543; Story, Com. Sec. 405; Willoughby, Const. Law, 2nd Ed. 1929, Sec. 40, *cf.* Sec. 42.

[6]Thus, in *Heisler* v. *Thomas Colliery Co.*, 260 U. S. 245, 259, the Court refused to construe the commerce clause so broadly as to reach coals which had been mined and prepared and made ready

a hundred years ago",[7] the scope of power intended to be conferred by constitutional grants must be determined with regard to the conditions prevailing antecedent to and contemporaneously with the adoption of the Constitution, and great weight is to be attached to contemporaneous exposi-

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for shipment to markets in other States but not yet shipped, stating that "the *reach and consequences*" of the contention repelled its acceptance since it would "nationalize all industries" and withdraw them "from State jurisdiction and deliver [them] to federal control". In *Kidd* v. *Pearson*, 128 U. S. 1, 20, a construction of the commerce clause which would prevent the States from prohibiting the manufacture of intoxicants even when for transportation into other States, was rejected because it would "extend the words of the grant to Congress, in the Constitution, beyond their obvious import, and is *inconsistent with its object and scope*". In the *Employers' Liability Cases*, 207 U. S. 463, 502, a construction of the commerce clause broad enough to support a statute requiring one engaged in interstate commerce to submit all his business concerns to the regulating authority of the Congress, was rejected because it rested "upon *the conception that the Constitution destroyed that freedom of commerce which it was its purpose to preserve*, since it treats the right to engage in interstate commerce as a privilege which cannot be availed of except upon such conditions as Congress may prescribe, even though the conditions would otherwise be beyond the power of Congress". In *Hammer* v. *Dagenhart*, 247 U. S. 251, 276, a construction of the Commerce Clause broad enough to authorize the prohibition of interstate movement of ordinary commodities made by child labor was rejected because *"the necessary effect"* was to infringe upon "a purely state authority". Applications of the same principle to defeat taxes regulatory of matters not within the Federal authority are familiar. *Child Labor Tax Case*, 259 U. S. 20, 38; *Hill* v. *Wallace*, 259 U. S. 44, 67, 68; *United States* v. *Constantine* (decided December 9, 1935). The same principle has been applied, without any express language in the Constitution, to prevent State taxation which would place the continued existence of the United States at the mercy of the States (*M'Culloch* v. *Maryland*, 4 Wheat. 316), or Federal taxation which would place the continued existence of the States at the mercy of the Federal Government (*Collector* v. *Day*, 11 Wall. 113, 127). *Cf. United States* v. *California* (decided February 3, 1936, pp. 4-5).

[7] *Missouri* v. *Holland*, 252 U. S. 416, 433; *Home Bldg. & Loan Assn.* v. *Blaisdell*, 290 U. S. 398, 443.

tion and interpretation,[8] as well as to the history of the clause for the last one hundred fifty years, as interpreted in the decisions of this Court.[9]

The fundamental principle upon which the framers acted, that is, to create a Federal Government of enumerated powers, rather than a centralized system of government, must likewise be given effect; and this requires that any power asserted by the United States must be "clearly within the reach of its constitutional charter", for the Court is "not at liberty to add one jot of power to the National Government beyond what the people have granted by the Constitution",[10] however socially desirable that might be.

Effect upon the scheme of the Federal Union as a whole, and intent, established by history, are, therefore, the tests to be applied in determining whether the commerce clause confers the novel power now claimed. The sources are (a) the history of the formation, adoption and ratification of the Constitution, and contemporaneous expositions of it, and (b) the history of its application and interpretation during the past 150 years in the decisions of this Court.

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[8] *Martin* v. *Hunter's Lessee*, 1 Wheat. 304; *Cohens* v. *Virginia*, 6 Wheat. 264, 418; *Prigg* v. *Pennsylvania*, 16 Pet. 539, 610, 611.

[9] *Home Bldg. & Loan Assn.* v. *Blaisdell*, 290 U. S. 398, 429-442.

[10] Brewer, *J.*, speaking for the Court in *Keller* v. *U. S.*, 213 U. S. 138, 145 and quoting Story, *J.*, in *Houston* v. *Moore*, 5 Wheat. 1, 48:

> "Nor ought any power to be sought, much less be adjudged, in favor of the United States, unless it be clearly within the reach of its constitutional charter. Sitting here, we are not at liberty to add one jot of power to the National Government beyond what the people have granted by the Constitution."

See, also, *Passenger Cases*, 7 How. 283, 394:

> "It is admitted that, in regard to the commercial, as to other powers, the States cannot be held to have parted with any of the attributes of sovereignty which are not plainly vested in the Federal Government and inhibited to the States, either expressly or by necessary implication."

PART II

THE POWER ASSERTED BY THE GOVERNMENT IS DESTRUCTIVE OF THE PRINCIPLE OF DUALITY IN OUR SYSTEM OF GOVERNMENT, AND IS REPUGNANT TO THE TENTH AMENDMENT.

1. The power to fix the price at which commodities may move in interstate commerce is the power to control markets and to depress and destroy production, employment and population. The possession of this power by the Federal Government would place the very existence of the States at its mercy.

As to markets:

(a) "The power to fix prices, whether reasonably exercised or not, involves power to control the market * * *."[1] The power to fix the price at which commodities may move in interstate commerce involves the power to set "a rampart of customs duties" at State lines; to establish, as respects particular States, "an economic barrier against competition with the products of another State or the labor of its residents"; to "neutralize advantages belonging to the place of origin" of the commodity; and to "neutralize the economic consequences of free trade among the States."[2]

(b) The rule of "free trade between the States" prescribed by the interstate commerce clause, for-

[1] *U. S.* v. *Trenton Potteries*, 273 U. S. 392, 397.
[2] *Baldwin* v. *Seelig*, 294 U. S. 511, 526, 527.

bids any State to legislate to keep its own *markets* for its own *products,* either by a prohibition upon the bringing in of commodities from other States, or by price regulation of such commodities.[3] It likewise forbids a State to legislate to retain its own *products* for its own *markets,* even though those products are a necessity to its people, are exhaustible, and are in danger of being exhausted.[4] The applicable principle of these cases is that, by the Constitution, "each State is made the greater by a division of its resources, natural and created, with every other State, and those of every other State with it."[5]

(c) As a result of this rule and of the development of transportation facilities, no State or community in this country is now independent of interstate markets or interstate products. This is certainly true of the coal producing States, 58% of whose production now moves to interstate consumption points.[6] It is true of the company involved in this suit, 97% of whose coal production in Virginia and West Virginia moves to markets in other States.[7] As this Court has said, "Primitive conditions have passed, business is now transacted on a national scale."[8]

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[3]*Baldwin* v. *Seelig,* 294 U. S. 511, 526, 527.

[4]*West* v. *Kansas Natural Gas Co.,* 221 U. S. 229, 255; *Pennsylvania* v. *West Virginia,* 262 U. S. 553, 598-600; *Foster Packing Co.* v. *Haydel,* 278 U. S. 1, 10, 11. This does not, however, prevent a State from legislating to prevent physical waste in production. *Champlin Rfg. Co.* v. *Commission,* 286 U. S. 210, 233-235; *Bandini Co.* v. *Superior Court,* 284 U. S. 8, 19, *et seq.*

[5]*West* v. *Kansas Natural Gas Co.,* 221 U. S. 229, 255.

[6]R. 940.

[7]FF. 22, R. 121; R. 4; R. 253.

[8]*Farmers L. & T. Co.* v. *Minn.,* 280 U. S. 204, 211, 212; *Burnet* v. *Brooks,* 288 U. S. 378, 402.

It thus appears that, under the economic conditions of today, the power to fix the price at which a commodity may move in interstate commerce is the power to control and destroy the markets of the States severally. It will not do to say that the framers did not realize how vast a power they were conferring; to urge that interstate commerce was relatively unimportant to the economic lives of the States in those days. The power would have been as destructive of the States and of the scheme of government if attempted to be exerted in 1787 as it is today, for by its use the Federal Government could have prevented the products of non-navigating States from reaching the seaports for export to the then important foreign markets.

Moreover, we are not concerned with the inquiry as to whether the framers in 1787 supposed that the interstate commerce power would ever be exercised in just this way. We are inquiring into the effect of the possession of the authority presently claimed upon the type of dual government the framers intended to found. The inquiry is as to the *nature* and *scope* of the power intended to be granted. That inquiry is not made by saying that, because of the different economic conditions of that day, the framers did not realize how vast a power they were unwittingly conferring. That is to read the Constitution "with literal exactness like a mathematical formula",[9] to ignore the fact that the Constitution was intended "to endure for ages to come";[10] to be blind to the principle which requires the construction of the Constitution as a whole and in the light of its object to create a division of powers between the State and Federal Governments, to create "an indestruc-

[9] *Home Bldg. & Loan Assn.* v. *Blaisdell*, 290 U. S. 398, 428.
[10] *M'Culloch* v. *Maryland*, 4 Wheat. 316, 415.

tible Union, composed of indestructible States."[11] "Constitutional provisions do not change, but their operation extends to new matters as the modes of business and the habits of life of the people vary with each succeeding generation."[12] It is impossible to maintain that, by the general language of the interstate commerce clause, the framers intended to confer a power capable of constitutional use for the complete economic destruction of the States either under the economic conditions of 1787 or under the economic conditions of 1936.

As to production, employment and population:

Whether price fixing is used for the purpose of stabilizing an industry by allocating to each producing State, area, and mine its existing quota of interstate markets (if such a result is humanly possible) or whether used discriminately, with a purpose, as well as an effect, of changing and shifting existing markets, the result is control of production, employment, and population. When price fixing is used discriminately, the extent of the power as above stated is clearly seen. It no less clearly exists though there be an attempt to "stabilize" prices as between producing districts and States. Price is the component of numerous fluctuating factors, many of which could not be controlled and are not attempted to be controlled by the present statute. These factors have heretofore exerted their effect upon the price, and have resulted in fluctuations thereof. With a stabilized price and with no attempt to stabilize these other components (except wages), the numerous fluctuations

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[11] *Texas* v. *White*, 7 Wall. 700, 725.

[12] *In re Debs*, 158 U. S. 564, 591; *Pensacola Tel. Co.* v. *Western Union Tel. Co.*, 96 U. S. 1, 9.

hitherto absorbed within the price system may now be reflected only in changes in *production* and *employment*.

Viewed in the light of these plain realities, the scope of the power now claimed by the Federal Government over the movements, livelihood and liberties of the people, and over the continued existence of the States as social and economic units, is appalling.

Possessed of such power, and unfettered as it is by any Constitutional requirement of uniformity, the Congress in its sole will could redistribute, restrict, or destroy the interstate markets, production and employment, and consequently the population of any State or community in the Nation.

The findings and exhibits in the records tell us that 94% of the iron ore in the United States is produced within Minnesota, Michigan and Alabama.[1] Under the power now claimed by the Government, it would be a political question for the Congress how much of the interstate markets each or any was to supply, and consequently how much iron ore should be produced in each of these States. Similarly, it would be for the Congress to prorate, allocate and discriminate between Montana, Utah, Arizona and Michigan as to which of them, and in what proportions, were to supply the 79% of copper production now produced by those four States.[2] It would be for the Congress to say whether Kansas, or Michigan, or Ohio, or New York, is hereafter to supply to the Nation the 80% of salt production which they now collectively supply, or whether each should continue to have a share of the interstate markets, and if

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[1]FF. 165, R. 206; Pl. Ex. 81 F-H, R. 970B-972A.

[2]FF. 165, R. 206; Pl. Ex. 81 I-K, R. 972B-974A.

so, how much.[3] To Congress also would fall the delicate task of determining as between California and Florida, whether either one in the future is to supply the whole of the 98% of oranges produced within the nation which they now collectively supply to interstate markets; or, if it were found expedient and "reasonable" that both should continue to share such markets, then Congress would have the still more delicate task of allocating those markets as between them.[4]

Illustrations might be multiplied. Congress would face allocation of motor vehicle production and distribution as between Michigan, California, Ohio and Indiana;[5] of motion picture production as between California and New York.[6]

Can any State in this *Federal*[7] Union have intended to confer such power upon a central government; have intended to make such questions political questions?

By the use of the price-fixing power, States and communities now thriving, farming lands and mines now productive, may be made idle and empty. Many wise reforms, perfectly "reasonable", no doubt, from the standpoint of the sentimental paternalist not directly affected thereby, could be effected by deflecting streams of commerce in order to shift the location of production and manufacture to better the conditions of individuals or to conserve natural resources. That such a course would destroy the States in a very literal sense no one can doubt.

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[3]FF. 165, R. 206; Pl. Ex. 81 L-N, R. 974B-976A.

[4]FF. 165, R. 206; Pl. Ex. 81 O-Q, R. 976B-978A.

[5]FF. 165, R. 207; Pl. Ex. 81 U-W, R. 980B-982A.

[6]FF. 165, R. 207; Pl. Ex. 81 R-T, R. 978B-980A.

[7]*U. S.* v. *Butler* (decided January 6, 1936, p. 6; see also pp. 13-14).

There is no need to speculate whether present Congresses would in fact be subject to the cliques and combinations of States so much discussed in the Constitutional Convention, which would set about to depress the commerce of particular States and to favor that of others.[8] It is enough that the opportunity would exist. The question is not how the power would be used but whether it exists. But, as we have seen, the scope and consequences of the authority asserted upon our Federal System are proper subjects of inquiry in determining the meaning and extent of the great general clauses of the Constitution, and it is therefore essential to note, as we have done, that the power contended for is a power to control and allocate and, if desired, destroy production and employment in particular communities for the supposed general good of all; and that such power, as asserted, is without any real or substantial check other than the discretion of a majority in the Congress.

That the illustrations above given as to the scope of the power now claimed by the Government are not fanciful is proved by the record in this present case, and by the arguments urged in support of this statute in the court below. An object of the present statute[9] is through price control to set a term to the competition for markets which has been going on between the northern and southern mines at least since 1880 (FF. 70-74, R. 144-146). An excuse offered for the price fixing measures adopted is that the competition of the southern mines has caused diversions and dislocations of commerce; in other words, that it has taken markets and business away from the northern mines. If the Congress may prevent or correct

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[8]For discussions on this point in the Constitutional Convention see pp. 159-161, 164-165, 166, 168, 169, 170, 171, 175, *post*.

[9]See p. 91, *ante*.

that, then it might have prevented the opening, through prohibitory price provisions, of any new mines in the year 1820, at which time, so far as the records show, the only coal production going on was in Maryland (FF. 70, R. 144; Pl. Ex. 69, R. 946A); and this, on the ground that the opening of new mines would divert and dislocate the interstate commerce of the Maryland mines. If Maryland had thought of it and had been able to muster a sufficient majority in the Congress, all future coal development in this country could have been halted at that point.

Possessing the power now claimed by the Government, Massachusetts and its neighbors, securing a majority of the Congress to aid them, could have prevented the well known "shift" of cotton mills from the North to the South which was undertaken in recent decades on a large scale in order to take advantage of the lower labor costs obtaining in Georgia and the Carolinas consequent upon the lower cost of living in those states.

Similarly, the growth of the automobile industry could have been halted in its tracks by prohibitory price control of interstate shipments of automobiles, upon the ground that interstate commerce in automobiles would "divert" or "dislocate" interstate commerce in horse drawn vehicles and in horses and mules, with consequent injury to the production of wagons, buggies, horses and mules,—a result which the Congress of that day might "reasonably" have regarded as opposed to the then general interests of the Nation at large.[10]

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[10]That this is not an extravagant statement as to the scope and effect of the asserted power is shown by the following quotation from an address of Professor Tugwell of the Department of Agriculture to the American Economic Association entitled "Principle of Planning and Laissez Faire" (The American Economic Review, Vol. XXII, Supplement No. 1, 1932, pp. 74-92):

> "Planning will necessarily become a function of the Federal Government; either that or the planning agency will supersede that government * * * business will logically be re-

Upon like grounds, price regulations could be made today to ameliorate or altogether to destroy the competition of oil with coal, or vice versa. Nor need the use of price regulation of commodities moving in interstate commerce be limited to redistribution of the localities of production. Upon the same basic theory advanced to support the statute now at bar, price discriminations might also be made as between the interstate movement of various kinds of foodstuffs, upon the ground that it is for the Congress to say what it is for the general welfare of the Nation that the people should eat. Under this disguise, sumptuary laws (with which we have had recent unfortunate experience[11]) could again be thrust upon us,—this time without constitutional amendment.

Obviously, also, the power to fix the prices at which commodities may cross State lines "might be made use of to compel the States to comply with the will of the Genl Government and to grant it any new powers which might be demanded".[12] The quoted language is taken from the

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quired to disappear. This is not an overstatement for the sake of emphasis; it is literally meant. The essense of business is its free venture for profits in an unregulated economy. Planning implies guidance of capital uses; this would limit entrance into or expansion of operations. Planning also implies adjustment of production to consumption; and there is no way of accomplishing this except through a control of prices and of profit margins. * * * New industries will not just happen as the automobile industry did; they will have to be foreseen, to be argued for, to seem probably desirable features of the whole economy before they can be entered upon [*ib.* 89-90] * * * The future is becoming visible in Russia. * * * Perhaps our statesmen will give way or be more or less gently removed from duty; perhaps our constitutions and statutes will be revised; perhaps our vested interests will submit to control without too violent resistance. It is difficult to believe that any of these will happen; it seems just as incredible that we may have a revolution. Yet the new kind of economic machinery we have in prospect cannot function in our present economy [*ib.* 92]".

[11]Eighteenth and Twenty-First Amendments.

[12]Madison, II Farrand 306, 362.

debate in the Constitutional Convention which resulted in prohibiting the Federal Government from laying any duty on exports to foreign countries,[13] duties on foreign commerce being in those days "the principal means by which commerce is regulated".[14]

2. The economic and social existences and rights of the States and of the people are as much protected by the Tenth Amendment against Federal encroachment as are the separate political existences of the States.

What has been said sufficiently indicates the complete control which the suggested view of the scope of the Commerce Clause would give the Federal Government over the economic and social lives of the people, and over the economic and social interests and existences of the States.

Consistently with the settled rules of constitutional interpretation previously discussed, the general language of the interstate commerce clause cannot be construed as conferring a power having such inevitable results upon the continued maintenance of the type of dual government for which the framers admittedly provided.

The Tenth Amendment did not preserve rights and powers to the States alone. It preserved rights and powers also to "the people".[1] Among these are social and economic rights which current history teaches will not lightly be surrendered, in no matter how worthy a cause.[2]

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[13]Const. Art. 1, sec. 9, cl. 5. For fuller discussion see pp. 167-174, *post*.

[14]*Passenger Cases*, 7 How. 283, 406.

[1]*Kansas* v. *Colorado*, 206 U. S. 46, 89-91.

[2]Following this Court's decisions in *Hammer* v. *Dagenhart*, 247 U. S. 251 (1918), and *Child Labor Tax Case*, 259 U. S. 20 (1922), a Child Labor Amendment was submitted to the State legislatures by the Congress in 1924. More than ten years of debates in the

Nor does the Tenth Amendment preserve merely the political existence of the States. The suggestion that the States be reduced to mere political corporations for local purposes was repeatedly rejected in the Constitutional Convention.[3] The adoption of the Constitution left the States as social and economic entities possessed of citizens owing loyalty to them and having their homes and businesses within their borders. The retention of that population, the preservation of those homes and those businesses, is a matter of the first importance not only to the States severally but to the people therein. Despite one hundred and fifty years of union, there are still local interests of an economic and social nature to be preserved. We were not in 1787, and have not yet become, one floating mass of population to be directed hither and yon in search of employment and homes by a central government in Washington. The vast majority of our people have fixed abodes with economic and social stakes of the first importance in the preservation of the existence, and the promotion of the prosperity, of their particular communities.

These economic and social interests and rights of the individual States and of the people therein were the primary concern of the framers of the Constitution. The history of the formation, adoption and ratification of the Constitution and of the first ten amendments establishes beyond cavil that the protection of those local economic interests,

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States upon this amendment have uncovered not merely economic but also social and religious objections to the granting of additional power to the Federal Government to accomplish even so worthy an object as this;—objections never presented to this Court at the argument of the *Hammer* and *Child Labor Tax Cases*. At this writing, the amendment has been accepted by only 24 States, having earlier been rejected by some of such States. More than ten years of argument have not as yet persuaded any of the remaining 24 States to grant additional power to the Central Government.

[3] I Farrand 287, 363, 366; II *id.*, 362-363; I *id.*, 167; II *id.*, 28.

rather than the mere preservation of the political entities of the States, was the primary consideration which impelled the granting of only a restricted commercial power to the national government and which impelled the adoption of the Tenth Amendment.[4]

Those interests require protection against the despotism of a centralized government as much today as they did in 1787.

When the ratification of the Constitution was trembling in the balance; when the friends of the new Constitution "found it necessary to urge", as Chief Justice Marshall points out, that the new central government was to be one "of enumerated powers" (*M'Culloch* v. *Maryland,* 4 Wheat. 316, 405), the States and the people were told in respect of those enumerated powers:

> "The powers of the general government relate to external objects, and are but few. But the powers in the states relate to those great objects which immediately concern the prosperity of the people."[5]

Notwithstanding this assurance, the States and the people enacted the Tenth Amendment as a guarantee to them that the Constitution should not thereafter be construed to have lurking within it the means for the destruction of the economic life of the States and "the prosperity of the people". If the view as to the scope of the commerce power now advanced be accepted, that guarantee will have been written in vain.

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[4]See pp. 154-181, *post.*

[5]Madison before the Virginia Convention, 3 Elliot's Debates 259.

PART III

THE HISTORY OF THE FORMATION, ADOPTION AND RATIFICATION OF THE CONSTITUTION, AND CONTEMPORARY EXPOSITIONS THEREOF, ESTABLISH THAT THE POWER NOW ASSERTED WAS NOT GRANTED.

1. This history demonstrates that had price fixing of commodities moving in interstate commerce been suggested as within the commerce grant, the language would have been varied so as to exclude it, or it would have been made a special exception.

Obviously, it is not a sound ground for denying the asserted scope of a granted power to say that it was not in the minds of the framers or the ratifiers of the Constitution when it was framed and ratified. As Chief Justice Marshall pointed out in the *Dartmouth College* case[1] "It is not enough to say that this particular case was not in the mind of the Convention when the article was framed, nor of the American people when it was adopted." We accept the burden of the test there laid down by the Chief Justice: "It is necessary to go further and to say that had this particular case been suggested, the language would have been varied as to exclude it, or it would have been made a special exception."

More than that appears here. A study of the whole of the record of the Federal Convention and of all of the documents relating to the history of the times, discloses not merely that it was not intended that the commerce

[1] 4 Wheat. 518, 644.

clause should have the scope now asserted; not merely that had price fixing of commodities moving in interstate commerce been suggested it would have been in terms excluded; but that specific proposals made in place of the commerce clause, in terms which would unquestionably have included the power now asserted, were repeatedly and emphatically rejected, and that specific other provisions were inserted in the Constitution with the express purpose of preserving the control of the individual States over their own economic and social interests and existences, including the right freely to trade beyond their own borders, and the preservations of the economic and social independence, and the business and industry, of the people.

2. The right to engage in interstate commerce antedated the Constitution and was not created by that instrument.

"The constitution", acknowledged Marshall in *Gibbons* v. *Ogden,*[1] "does not confer the right of intercourse between State and State. That right derives its source from those laws whose authority is acknowledged by civilized men throughout the world". Said he: "The Constitution found it an existing right, and gave to Congress the power to regulate it". That right existed long before the Constitution was adopted and had been expressly guaranteed by the Articles of Confederation.[2]

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[1] 9 Wheat. 1, 211.

[2] See *Slaughter-House Cases*, 16 Wall. 36, 75. As stated by Mr. Chief Justice Baldwin in *Hoxie* v. *N. Y., N. H. & H. R. Co.*, 82 Conn. 352, 364: "The right to engage in commerce between the States is not a right created by or under the Constitution of the United States. It existed long before that Constitution was adopted. It was expressly guaranteed to the free inhabitants of each State by the Articles of Confederation (Art. IV) and impliedly guaranteed by Art. IV, § 2, of the Constitution of the United States as a privilege inherent in American citizenship."

3. The power over interstate commerce was conferred upon Congress in order to remove restraints upon that right which the States had imposed against each other.

After the Revolution and prior to the Constitution, commerce between the States was obstructed by "the mutual jealousies and aggressions of the States, taking form in customs barriers and other economic retaliation."[1] Madison points out that:

> "the States having ports for foreign commerce, taxed & irritated the adjoining States, trading thro' them, as N. Y. Pena. Virga. & S- Carolina. . Some of the States, as Connecticut, taxed imports as from Massts higher than imports even from G. B. of wch Massts. complained to Virga. and doubtless to other States (see letter of J. M.) In sundry instances of as N. Y. N. J. Pa. & Maryd. (see) the navigation laws treated the Citizens of other States as aliens."[2]

The discussions of the Congress under the Articles of Confederation "are full of the subject of the injustice done by the States who had good seaports, by duties levied in those States on foreign goods designed for States who had no such ports"[3]; and the subsequent debates in the Constitutional Convention show that the purpose of the interstate commerce clause was that: "The oppression of the uncommercial States [those without seaports] was guarded agst. by the power to regulate trade between the States".[4]

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[1] *Baldwin* v. *Scelig,* 294 U. S. 511, 522.
[2] III Farrand 548.
[3] *Woodruff* v. *Parham,* 8 Wall. 123, 134.
[4] II Farrand 308.

In urging the ratification of the Constitution, it was pointed out in the Federalist[5] that this power was a "supplemental provision" to "the great and essential power of regulating foreign commerce", and that a very material object of the commerce power was "the relief of the states which import and export through other states, from the improper contributions levied on them by the latter". In that paper Madison explains what is meant by the federal regulation of interstate commerce by giving examples of its exercise in other confederated States, such as Switzerland, Germany and the Netherlands; and in every instance the only purpose mentioned is the prevention of the imposition of tariff duties between confederated States.[6]

Years later, Madison records, in a document to which we shall later refer, that the interstate commerce power "grew out of the abuse of the power by the importing States in taxing the non-importing, and was intended as a negative and preventive provision against injustice against the States themselves * * *".[7]

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[5]No. XLII (Madison).

[6]"The necessity of a superintending authority over the reciprocal trade of confederated states, has been illustrated by other examples as well as our own. In Switzerland, where the union is so very slight, each canton is obliged to allow to merchandises, a passage through its jurisdiction into other cantons, without an augmentation of the tolls. In Germany, it is a law of the empire, that the princes and states shall not lay tolls or customs on bridges, rivers, or passages, without the consent of the emperor and diet; though it appears from a quotation in an antecedent paper, that the practice in this, as in many other instances in that confederacy, has not followed the law, and has produced there the mischiefs which have been foreseen here. Among the restraints imposed by the union of the Netherlands on its members, one is, that they shall not establish imposts disadvantageous to their neighbours, without the general permission." The Federalist, No. XLII.

[7]Madison to Cabell, III Farrand 478.

Every statement in the debates or by contemporaries, directly referring to the purpose of the Commerce Clause, is in line with the references just reviewed. At no time in the Constitutional Convention or during any of the proceedings leading to the ratification of the Constitution is there anything to intimate that this power was intended to give the Federal Government authority to prohibit the movement of commerce between the States, to fix the prices at which commodities could move in that commerce, or otherwise to accomplish the same obstruction to the freedom of that commerce which the States had practiced before the adoption of the Constitution.

This is not conclusive; but much more appears.

4. Formation and adoption of commerce clause—Repeated refusal to grant powers to legislate where states incompetent or to negative state laws.

The records of the Federal Convention do not disclose debate upon the motion for adoption of the commerce clause itself. It appears that the clause in its present form[1] was agreed to *nem. con.*,[2] but since this occurred immediately after a temporary adjournment of a heated debate respecting the enactment of a prohibition upon the commerce power forbidding the Federal Government to tax exports from any state, every suggestion that the power of interstate commerce was intended to include the power to stifle or destroy the economic lives of the individual states is repelled.[3]

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[1]With the exception of the Indian clause which was added later without debate. II Farrand 497, 499.

[2]II Farrand 308.

[3]II Farrand 308. See discussion pp. 167-174, *post.*

But the conclusion as to the intended scope of the power over interstate commerce, already pointed out as having been voiced in the general debates, is fortified by consideration of the general affirmative legislative power and the general negative on state laws which it was originally proposed to give to the Federal Government and which the commerce clause and other enumerated powers replaced.

When the Convention opened, it had before it the Virginia Plan. In that plan the provisions for the legislative power of the General Government were as follows:

> "6. Resolved that each branch ought to possess the right of originating Acts; that the National Legislature ought to be impowered to enjoy the Legislative Rights vested in Congress by the Confederation & moreover to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual Legislation; to negative all laws passed by the several States, contravening in the opinion of the National Legislature the articles of Union; and to call forth the force of the Union agst. any member of the Union failing to fulfill its duty under the articles thereof."[3a]

This last clause was promptly dropped[4]; so that the important provisions were those (a) giving the Federal Government a general legislative power in all cases in which the states were incompetent and (b) giving it a power to negative all laws of the states which in the opinion of the National Legislature violated the Articles of the Union.

These provisions were initially agreed to as statements of principle only, objection being made "to the vagueness

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[3a] I Farrand 21.
[4] I Farrand 54.

of the term *incompetent*" [sic] and to the fear that the Convention was "running into an extreme in taking away the powers of the states".[5] Both these provisions were subsequently rejected, specific enumeration of the powers being substituted for the general affirmative legislative power, and the supremacy clause and judicial review being substituted for the negative.[6]

The proposals for legislative powers in respect of matters in which the States were incompetent, and proposals for the negative, both died hard; and in the debates thereon it appears that among objections successfully urged against them was the fear of restriction of the economic lives of the several states.

The provision for a negative on state laws was early proposed in an even broader form, that is, to give to the National Legislature the power to negative all state laws "which to them shall appear improper" instead of those "contravening in the opinion of the National Legislature the Articles of the Union."[7]

Madison defended "an indefinite power to negative legislative acts of the States as absolutely necessary to a perfect system",[8] and Dickenson, supporting him, said that it

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[5]I Farrand 53.

[6]II Farrand 28-29. In the early days of the Convention, delegates from New Jersey offered a plan which enumerated a few legislative powers, including a power "to pass Acts for the regulation of trade & commerce as well with foreign nations as with each other." (I Farrand 243). This plan was compared with the Virginia plan and rejected. As to the legislative powers, it was thought that the New Jersey plan gave the Congress power "only in a few inadequate instances." (I Farrand 277). It will be noted that the subsequent enumeration of powers under the Virginia plan did not go beyond the New Jersey plan in its grant of power over commerce.

[7]I Farrand 162, 164.

[8]I Farrand 164.

was impossible to draw the line between proper and improper laws of the states and that "We must take our choice of two things. We must either subject the States to the danger of being injured by the power of the Natl. Govt. or the latter to the danger of being injured by that of the States."[9]

The states did make their choice, and voted the proposal down.[10] The debates show that consideration of their continued economic interest was a controlling factor as well as consideration of the preservation of their interstate rivalry. Said Gerry:

> "The Natl. Legislature with such a power may enslave the States".[10a] "* * * This power may enable the Genl. Govt. to depress a part for the benefit of another part— it may prevent the encouragements which particular States may be disposed to give to particular manufactures."[11]

And that the preservation of intrastate industry was not the only point in the minds of the delegates is shown by Bedford's objection:

> "Is there no difference of interests, *no rivalship of commerce,* of manufactures?"[12]

The negative in its narrow form, that is, limited to negativing those state laws which in the opinion of the National Legislature varied the Articles of the Union, then came on for consideration. Madison disclosed that he re-

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[9]I Farrand 167.

[10]I Farrand 168. In the debate it was urged on behalf of proponents of the negative: "We are now one nation of brethren. We must bury all local interests & distinctions." I Farrand 166.

[10a]I Farrand 165.

[11]I Farrand 171-172.

[12]I Farrand 167.

garded this also as in effect an indefinite negative since it was "in the opinion of the National Legislature" that they should act; and referred to the prerogative of the British Crown as a precedent, stating:

> "Nothing could maintain the harmony & subordination of the various parts of the empire, but the prerogative by which the Crown, stifles in the birth every Act of every part tending to discord or encroachment. It is true the prerogative is sometimes misapplied thro' ignorance or a partiality to one particular part of ye. empire: but we have not the same reason to fear such misapplications in our System."

In opposition it was stated that this proposal would "disgust all the states". It was promptly voted down followed by *nem. con.* adoption of the supremacy rule.[13]

A final attempt to include a broad negative was made later in the convention after the enumerated powers had been settled and the supremacy clause had been adopted, the excuse being given that the small states could no longer have any objection to a negative power since the disproportion in representation had been cured by the equality established in the Senate. This broad negative was as follows:

> "To negative all laws passed by the several States interfering, in the opinion of the Legislature, with the general interests and harmony of the Union —provided that two thirds of the Members of each House assent to the same."[13a]

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[13]II Farrand 28-29.
[13a]II Farrand 382, 390.

Madison supported the measure, and Wilson "considered this as the key-stone wanted to compleat the wide arch of Government we are raising".[14]

But Mason "wished to know how the power was to be exercised", and Rutledge thought that "this alone would damn and ought to damn the Constitution".[14a] So the proposition was voted down.[15]

Even after the adoption of the enumerated powers there were three further attempts by proponents of centralized government to secure authority to legislate in respect of matters to which single states were incompetent. Madison proposed a new power to read:

> "To grant charters of incorporation in cases where the Public good may require them, and the authority of a single State may be incompetent."[16]

The committee to which this was referred reported back:

> "The Committee report that in their opinion the following additions should be made to the report now before the Convention vizt"
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> * * * * * * * *
>
> ""and to provide, as may become necessary, from time to time, for the well managing and securing the common property and general interests and welfare of the United States in such manner as shall not interfere with the Governments of individual States in matters which respect only their internal Police, or for which their individual authorities may be competent.' "[17]

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[14] II Farrand 391.
[14a] II Farrand 390-391.
[15] II Farrand 382, 391.
[16] II Farrand 325.
[17] II Farrand 366, 367.

But this attempt likewise met defeat. The committee report was postponed[17a] and never again taken up.

Madison resubmitted his proposal in the closing days of the convention and it was once again voted down.[18]

While, therefore, debates upon the express subject of the commerce clause itself are lacking, these things at least are clear:

(a) That the states had in mind the preservation of their individual economic existence; and

(b) That they consistently refused to give to the General Government such indefinite powers as the power to legislate upon matters in which the states were individually incompetent and refused also to give to the General Government any negative of any kind upon state laws.

5. Distinctions between power over foreign commerce and power over interstate commerce—Grounds therefor—Express restrictions on foreign commerce power.

Controlling light is thrown on the purpose and intended scope of the interstate commerce power by the debates and actions of the Convention in respect of the foreign commerce power.

While the power to regulate both interstate and foreign commerce is conferred upon the Congress in the same clause and in the same language of grant,[1] the Constitution con-

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[17a]II Farrand 368.

[18]II Farrand 615, 616.

[1]Art. I, Sec. 9, Clause 3: "The Congress shall have Power * * * To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;". The clause respecting Indian Tribes is unimportant to the instant question. It was added during the closing days of the Constitutional Convention without debate. See II Farrand 497, 499.

tains express exceptions and restrictions to the power in the one case and not in the other; and it is settled that there is wide distinction in the extent of the power that Congress may exercise over foreign commerce and that which it may exercise in respect of commerce among the States themselves.[2] The history of the origin of this distinction is decisive in interpretation of the *interstate* commerce power in respect of the validity of the present claim that it includes a power to fix the price at which commodities may move from one State to another.

Prior to and at the time of the adoption of the Constitution, the commerce that was important to the several States was commerce with foreign nations; and the chief, if not the sole, important *instrumentality* of commerce, both foreign and domestic, was navigation. The dangers, delays, and expense of land travel between the States at that period are too well known to need review here.[3]

The interstate commerce power, as already pointed out, was intended as a negative and preventive provision to put an end to customs barriers and other restrictive provisions as between States, by empowering the Federal Government to keep that commerce free. But, in respect of the foreign commerce power, it was recognized to be necessary to confer upon the Federal Government the authority to deal drastically with the sorry condition in which our foreign commerce stood, and to establish a uniform policy of free trade, of protection, or of reciprocity with foreign nations.[4] So long as the thirteen States had different policies in this

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[2] *Atlantic Cleaners & Dyers* v. *U. S.*, 286 U. S. 427, 434; *Board of Trustees* v. *U. S.*, 289 U. S. 48, 57.
Weber v. *Freed*, 239 U. S. 325, 329, 330.

[3] See, for example, Beveridge, Life of Marshall, ch. VII.

[4] Story, Com., Sec. 261.

regard, no foreign nation would enter into any reciprocal trade agreement with the United States, for foreign nations monopolized the American trade at the ports of those States which left it free for their own advantages, while at the same time placing heavy duties and prohibitions against American vessels in foreign ports. The result was ruin to American shipping, failure to secure from Great Britain any relaxation of its monopoly of the West India trade, and general humiliation at the impotency of the Congress, which could not take any steps in respect of foreign trade which were not consistent with the policies of all the States.[5] As Madison points out, the [illegible] of the foreign commerce power to the Congress grew out of the fact that: "The want of authy. in Congs. to regulate Commerce had produced in Foreign nations particularly G. B. a monopolizing policy injurious to the trade of the U. S. and destructive to their navigation; the imbecility and anticipated dissolution of the Confederacy extinguishg. all apprehensions of a Countervailing policy on the part of the U. States."[6]

Notwithstanding these weighty reasons for an absolute foreign commerce power in the Federal Government, the southern non-navigating States were fearful that the northern States would use such power to pass a navigation act in restraint of the navigation of foreigners and in favor of that of the northern States and that this would enhance the freights which the southern States paid upon the export of their commodities.[7] They accordingly insisted that a two-thirds vote of the Congress should be necessary to pass

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[5]Story, *id.;* Madison, III Farrand 547, 548.

[6]III Farrand 547.

[7]Hamilton, in the New York convention, 2 Elliot, Debates, 235; Madison, II Farrand 449, 452.

a navigation act.[8] They finally gave up this demand on a compromise in which they secured the provision permitting the Congress to prohibit the importation of slaves prior to 1808.[9]

But this compromise was limited to permitting the regulation of *imports* in foreign commerce. The south refused to make the question of Federal regulation of exports a matter of compromise, stating that they "would never agree to the power of taxing exports."[9a] Not satisfied with this, three additional specific restrictions were placed upon the authority of the Congress to regulate foreign commerce, and two were placed upon the authority of the States. Most important of these is the provision prohibiting the Federal Government from laying any tax or duty upon articles exported from any State.[10] The debates upon that restriction, which are discussed fully in the next sub-division of this brief, disclose that the express purpose of it was to prevent Federal domination and control of the extra State commerce, and hence of the local production, of the individual States,—the very thing that the present statute seeks to accomplish. The debates upon that clause are conclusive against the power now claimed, as more fully developed hereinafter. Before proceeding to that, brief reference to the other restrictions upon the foreign commerce power may be made.

After the Constitutional Convention had agreed upon the Commerce Clause in its present form, the question of

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[8]Some of the motions presented spoke of acts "regulating commerce", but that meant navigation and foreign commerce in that day, and the debates disclose that what they feared was a navigation act. II Farrand 449-453.

[9]Const. Art. I, Sec. 9, Clause 1.

[9a]II Farrand 374, 366, 183.

[10]Const. Art. I, Sec. 9, Cl. 5.

restrictions upon the foreign commerce power was presented for consideration. The four restrictions upon the Federal power in this respect[11] were placed in a single section as express restrictions on the commerce power, but were subsequently placed in their present positions in the Constitution by the Committee on Style & Arrangement.[12]

The provisions prohibiting preferences against ports and respecting clearances of vessels[13] and for uniform duties, imposts and excises[14] were introduced by the Maryland delegates who "almost shuddered at the fate of the commerce of Maryland should we be unable to make any change in this extraordinary power."[15]

The purpose of these provisions is plain. The provision respecting ports and clearance "is a limitation upon the power of Congress to regulate commerce for the purpose of producing entire commercial equality within the United States". It "was intended to establish among them a perfect equality in commerce and navigation. That all should be alike, in respect to commerce and navigation, is an enjoined constitutional equality, which can neither be interrupted by Congress nor by the States." (*Passenger Cases,* 7 How. 283, 414, 420); and the same purpose is involved in the provision respecting uniformity of duties, imposts and excises. (*Id.,* p. 420.)

A provision was likewise included prohibiting State imposts or duties on either imports or exports[16] in order to supplement the interstate commerce power in preventing

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[11]Importing slaves; tax on exports; port preferences and clearance; uniformity of duties, imposts and excises.

[12]II Farrand 571, 590, *et seq.*

[13]Const. Art. I, Sec. 9, Cl. 6.

[14]Const. Art. I, Sec. 8, Cl. 1.

[15]II Farrand 211, 378, 410, 417-418.

[16]Const., Art. I, Sec. 10, Cl. 2.

the seaport States from restricting the commerce through them to and from the States without ports. An express restriction for this purpose was regarded as proper, although Madison remarked that "perhaps the best guard against an abuse of the power of the States on this subject was the right in the Genl. Government to regulate trade between State & State."[17]

The final restriction, forbidding any State without the consent of Congress to lay any duty of tonnage,[18] was for the purpose of preventing the States from restricting the instrumentalities of interstate commerce, *i.e.*, vessels, while permitting the States a concurrent jurisdiction where Congress deemed it wise.[19]

6. "No Tax or Duty shall be laid on Articles exported from any State" (Article I, Section 9, Clause 5).

This clause is a restriction on the Federal Government. It was enacted solely to prevent that Government from controlling the movement of products of the agricultural States into commerce,—in that day and age, into foreign commerce.

The prohibition was enacted over Madison's contention that it might sometimes be necessary for the General Government to tax exports and that "we ought to be governed

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[17]II Farrand 588, 589.

[18]Const., Art. I, Sec. 10, Cl. 3.

[19]Speaking of this clause, this Court said in *Huse* v. *Glover*, 119 U. S. 543, 549-550:

> "A duty on tonnage within the meaning of the Constitution is a charge upon a vessel, according to its tonnage, as an instrument of commerce, for entering or leaving a port, or navigating the public waters of the country; and the prohibition was designed to prevent the States from imposing hindrances of this kind to commerce carried on by vessels."

by national and permanent views",[1] and over Wilson's complaint that "to deny this power is to take from the Common Govt. half the regulation of trade";[2] and over Governeur Morris's suggestion that "local consideration ought not to impede the general interest",[3] and that "however the [national] legislative power may be formed, it will if disposed be able to ruin the Country".[3a]

The debate arose when a committee explained that the taxing clause by including the word "imposts" intended to give the General Government an authority to tax in respect of commerce.[4] Whereupon, Mason moved to add a prohibition against taxing exports as a rider to the Federal taxing power,[5] Pinkney having previously served notice that the Southern States would require such a clause as a security to them.[6]

The reasons for the demand of the South for the enactment of this clause were that the Southern or "the Staple States" not only feared that a tax falling largely upon their productions would be unjust but they feared combinations in the Congress against them through the use of this power.[7] Mr. Mason

> "hoped the Northn. States did not mean to deny the Southern this security. It would hereafter be as desirable to the former when the latter should become the most populous. He professed his jealousy for the *productions* of the Southern or as he called

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[1] II Farrand 361.
[2] II Farrand 362.
[3] II Farrand 360.
[3a] II Farrand 307.
[4] II Farrand 305.
[5] II Farrand 305-306.
[6] II Farrand 95, I Farrand 592.
[7] II Farrand 305-306, 362-363.

> them, the staple States. * * * If he were for reducing the States to mere corporations as seemed to be the tendency of some arguments, he should be for subjecting their exports as well as imports to a power of general taxation—. He went on a principle often advanced & in which he concurred, that 'a majority when interested will oppress the minority.' "[8]

The Southern States had previously won their battle for equal representation in the Senate on the same ground of discrimination against their trade by the Legislature elected only on a proportionate basis, but they were not satisfied with this for they pointed out they were still in a minority and "The Southern States had therefore ground for their suspicions."[9]

Supporting the Southern view:

> "Mr. Gerry thought the legislature could not be trusted with such a power. It might ruin the Country. It might be exercised partially, raising one and depressing another part of it. * * * It might be made use of to compel the States to comply with the will of the Genl Government, and to grant it any new powers which might be demanded— We have given it more power already than we know how will be exercised— It will enable the Genl Govt to oppress the States, as much as Ireland is oppressed by Great Britain."[10]
>
> "Mr. Sherman * * * The Government would not be trusted with such a power. Objections are most likely to be excited by considerations relating to taxes & money. A power to tax exports would shipwreck the whole."[11]

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[8] *Ibid.*
[9] II Farrand 362-363.
[10] II Farrand 307, 362.
[11] II Farrand 307-308.

> "Mr. Butler was strenuously opposed to a power over exports; as unjust and alarming to the staple States."[12]

Various compromises were suggested by the friends of a centralized government in the hope of averting a complete prohibition of the power. Mr. Dickenson suggested while the power of taxing exports

> "may be inconvenient at present; but it must be of dangerous consequence to prohibit it with respect to all articles and for ever. He thought it would be better to except particular articles from the power."

but Sherman answered:

> "It is best to prohibit the National legislature in all cases. *The States will never give up all power over trade.* An enumeration of particular articles would be difficult invidious and improper."[13]

Mr. Langdon suggested:

> "It seems to be feared that the Northern States will oppress the trade of the Southn. This may be guarded agst by requiring the concurrence of ⅔ or ¾ of the legislature in such cases."[14]

but on a vote moved by Mr. Madison the suggestion was voted down.[15]

It was finally suggested that the Federal Government's power to tax the export trade of the States be qualified to taxation for revenue purposes, the argument being made:

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[12]II Farrand 360.
[13]II Farrand 361.
[14]II Farrand 359.
[15]II Farrand 363.

> "that every State might reason with regard to its particular *productions*, in the same manner as the Southern States. The middle States may apprehend an oppression of their wheat flour, provisions, &c. and with more reason, as these articles were exposed to a competition in foreign markets not incident to Tobo. rice &c— They may apprehend also combinations agst. them between the Eastern & Southern States as much as the latter can apprehend them between the Eastern & middle—"[16]

but this suggestion likewise was voted down and the unqualified prohibition as we now have it in the Consfitution was enacted by a vote of seven states to four.[17]

In the light of the debate on this export tax, can there be any possible doubt that "had this particular case been suggested", that is, had it been suggested that the interstate commerce clause included a power to condition the movement of articles of commerce in interstate commerce upon acceptance of Federal price control, that "the language would have been so varied as to exclude it, or it would have been made a special exception", *Dartmouth College* case, 4 Wheat. 518, 614? Does not the action thus specifically taken by the States to prevent the Central Government from regulating their outgoing trade and commerce to foreign nations by financial restrictions completely repel the conclusion that it was intended to give precisely that power to the Central Government in respect of trade between the States?

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[16]Madison, II Farrand 363.

[17]Madison, II Farrand 363. This export tax prohibition was not involved in the great convention compromise on the commerce clause (discussed pp. 164-165, *ante*). The Southern States refused to permit this prohibition to be committed as a part of the compromise movement, considering it as a *sine qua non* of their entry into the Union that they have this protection against domination by the general government of their export trade. See II Farrand 374, 366, 183.

Moreover, this express prohibition of Federal regulation of export trade ("duties" being the primary method of "regulating commerce" in those days)[18] was put in the Constitution at the instance, and primarily for the economic protection, of States without good seaports or a developed navigation. Yet if the Federal power to regulate interstate commerce was intended to authorize the Congress to prohibit or restrict commerce *among* the States for economic reasons, the commodities of those States could reach the seaports only with the permission of the Federal Government, and this export tax clause would be no protection to them whatever, and hence utterly meaningless.[19] This consideration, alone, must fairly be regarded as establishing conclusively that the authority intended for and given to the Congress by the interstate-commerce clause is an authority to free interstate commerce from State restrictions, and not an authority itself to restrict or prohibit such commerce for economic or social reasons, however lofty.

We do not, however, rely merely upon implications of this debate upon the export tax provision and of the action taken thereon. During that debate, the meaning of the interstate commerce clause itself came into question and received a construction wholly at variance with that now suggested by the Government. In the debate on the proposal to ban Federal taxes on articles exported from any State, it was suggested on behalf of the smaller northern "non-commercial" states of New Jersey, Connecticut and Delaware, that the prohibition of a Federal tax would not relieve their difficulties since the Constitution as it then

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[18] *Passenger Cases*, 7 How. 283, 406.

[19] The Guffey Act expressly provides for Federal fixation of the prices at which coal may be shipped to Canada and to Cuba (Sec. 4, Part II(e), Appendix, p. 17, fol. 64).

stood left the non-commercial States, that is, the non-navigating States, still open to be taxed on their exports by exporting States.[20] In answer to this, it was suggested that "the power of regulating trade between the States will protect agst each other",[21] and that "the oppression of the uncommercial States was guarded agst. by the power to regulate trade between the States."[22]

Madison thereupon pointed out that the authority of the National Government to regulate commerce among the several States could never other than indirectly restrict the liberty which the Constitution then left to the exporting States to tax exports. Said he:

> "The regulation of trade between State and State can not effect more than indirectly to hinder a State from taxing its own exports; *by authorizing its Citizens to carry their commodities freely into a neighbouring State* which might decline taxing exports in order to draw into its channel the trade of its neighbours"[23]

This view of the power over interstate commerce, *i.e.*, that it was a power to keep commerce free between the States, and no more, led to the inclusion in the Constitution of the express prohibition forbidding any State to lay imposts or duties on either imports or exports, previously mentioned.

The view of the Interstate Commerce Clause thus expressed by Madison, as above quoted, was stated by him after the Commerce Clause itself had been agreed upon

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[20]II Farrand 306, 307, 359, 360.
[21]II Farrand 360.
[22]II Farrand 308.
[23]II Farrand 362.

in the Convention and after attempts to secure a broader grant of Federal legislative power for internal regulations had been defeated. This statement, therefore, can be regarded as nothing less than an admission, as to the Interstate Commerce Clause issue, of defeat met on the field of battle by the then champion of centralized form of government, an admission repeated by Madison more than forty years later, as will be seen.

7. Conclusions from these debates—Madison's final view as to the limited scope of the interstate commerce clause.

What has been reviewed leads inescapably to the conclusion that, against the advice and wishes of those desiring a centralized form of government, the States desired and intended to, and in fact did, preserve their individual economic interests and existence against the possibility of domination, prejudice or destruction either by the Federal Government, by a combination of other States, or by any other State singly.

The conditions of that day were responsible for the form which the framers took to preserve such economic State rights. The purpose and intent is plain and the only possible conclusion,—a conclusion already accepted by this Court,[1]—is that the interstate commerce power was intended to have a narrower scope than the foreign commerce power. If, as is clear, the express restrictions were placed upon the foreign commerce power to prevent its being used to burden or condition the right of States to export commodities into foreign commerce in precisely the same way

[1] *Atlantic Cleaners & Dyers* v. *U. S.*, 286 U. S. 427, 434; *The Abby Dodge*, 223 U. S. 166, 176, 177; *Board of Trustees* v. *U. S.*, 289 U. S. 48, 57; *Brolan* v. *U. S.*, 236 U. S. 216, 218-222.

that the present statute attempts to burden and restrain the export of a State's commodities into another State, how is it possible to say that the narrower grant to regulate interstate commerce comprehends precisely the power that was stricken expressly from the broader grant?

"The clear and obvious intention" of these express restrictions upon the power of the Congress to regulate *foreign* commerce "was that Congress might not have the power of imposing unequal burdens; that it might not be in their power to gratify one part of the Union by oppressing another"; "to guard us against the dangerous bias of interest, and the power of numbers"; "to defend the great staples of the Southern States—tobacco, rice and indigo—from the operation of unequal regulations of commerce, or unequal indirect taxes, as another article had defended us from unequal direct taxes."[2] And the same contemporary adds that "the present Constitution had never been adopted without those preliminary guards in it."[3]

And yet, although it is equally certain that the Constitution would not have been adopted had it been supposed that the *interstate* commerce grant conferred upon the Congress a power to do those things, we find not one single express exception or restriction in the Constitution to the power to regulate commerce among the States themselves.

But can anyone doubt that had it been so much as suggested that the interstate commerce power was intended as anything more than a supplement to the foreign commerce power, intended to keep the movement of goods

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[2]Hugh Williamson in the House of Representatives, February 3, 1792, III Farrand 365, 366.

[3]*Ibid.*

within the United States free from restrictions, that that power, too, would likewise have been expressly limited to preserve the same economic State's rights?

We also find express statements confirming the narrower scope intended for the interstate commerce power, and a Convention history replete with attempts to enact, in the place of the commerce and other express powers, a broad general power to legislate as to all matters in which the several States might be incompetent, or in which the harmony of the Union might require legislation; replete with the defeat of those attempts by those bent upon maintaining, not merely the political existence of the separate States, but their separate economic lives and their commercial interests against domination by a central government.

No one will contend that it was or is desirable or that it was intended, that the Nation should have a *lesser* power in respect of foreign commerce than in relation to *internal* commerce. No one will assert that States unwilling to trust their economic lives to the unrestricted control of their Sister States, or of a General Government, in respect of their foreign commerce, should be willing to do so in respect of domestic. The explanation must and does lie in the lesser scope and extent intended for the internal commerce grant; otherwise, why the exceptions and restrictions to the grant respecting foreign commerce, and the absence of any restrictions or exceptions to the internal commerce grant?

Surely, on such a history, the only conclusion to be drawn is that the power given to the Federal Government over interstate commerce was not feared because it was intended as a negative and preventive provision to keep commerce among the States themselves free from restrictions of the States, and was not intended to permit the

Federal Government itself to burden that commerce or apportion or allocate it as between States; and, because of the restricted scope and extent of the power intended by the interstate commerce grant,—great though that power is,—it was not found necessary to place upon it the restrictions to secure uniformity and to prevent economic strangulation or favoritism as between State and State which were expressly placed upon the exercise of the Federal power to regulate foreign commerce.

No one can read the *whole* of the history of the times and of the formation and adoption of the Constitution, and its contemporary construction, with an open mind, without concluding that Madison voiced the only possible conclusion respecting the difference in scope between the foreign and interstate commerce powers when he said in later years:

> "For a like reason, I made no reference to the 'power to regulate commerce among the several States.' I always foresaw that difficulties might be started in relation to that power which could not be fully explained without recurring to views of it, which, however just, might give birth to specious though unsound objections. Being in the same terms with the power over foreign commerce, the same extent, if taken literally, would belong to it. Yet it is very certain that it grew out of the abuse of the power by the importing States in taxing the non-importing, and was intended as a negative and preventive provision against injustice among the States themselves, rather than as a power to be used for the positive purposes of the General Government, in which alone, however, the remedial power could be lodged."[4]

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[4]Madison to Cabell, February 13, 1829. III Farrand 478. Cited in *Baldwin* v. *Seelig*, 294 U. S. 511, 522.

The force of this statement is best appreciated when it is remembered that it was Madison, the Father of the Constitution,[5] whose journal is accepted as the authoritative report of the proceedings of the Constitutional Convention, who was the leading spirit throughout its progress in attempting to have the commerce power broadened; in attempting to build a centralized form of government; in attempting to have adopted, in place of as well as in addition to the Commerce Clause and other specific grants of power, a general power to legislate in respect of all matters for the general welfare of the Nation, and in which the several States should be incompetent to act. Yet even he has had to admit that his wishes, and the desires of those holding his view, met with defeat; and that the only power —great as it is—intended to be conferred, and in fact conferred by the interstate commerce clause upon the Federal Government, is as he stated.

8. Scope of the commerce clause as explained by framers in order to secure ratification—The Tenth Amendment.

The wide fears of the States and the people which sprang up when the new Constitution was submitted to the State legislatures and became known, are familiar. To quiet these alarms the proponents of the Constitution found it necessary to utter reassurances both in debates in the State ratifying bodies and in documents of public distribution. What were the States and the people told respecting the commerce clause during this period?

They were told by the framers of the instrument that the commerce clause would provide "An unrestrained inter-

[5]See *Woodruff* v. *Parham*, 8 Wall. 123, 135.

course between the States themselves * * * a free circulation of the commodities of every part," and that failure to adopt the Constitution would result in intercourse between States being "fettered, interrupted, and narrowed."[1]

They were told that

> "If the new Constitution be examined with accuracy and candour, it will be found that the change which it proposes consists much less in the addition of NEW POWERS to the union, than in the invigoration of its ORIGINAL POWERS. The regulation of commerce, it is true, is a new power; but that seems to be an addition which few oppose, and from which no apprehensions are entertained."[2]

They were told that

> "The powers of the general government relate to external objects, and are but few. But the powers in the states relate to those great objects which immediately concern the prosperity of the people."

and that

> "All agree that the general government ought to have power for the regulation of commerce. I will

[1]"An unrestrained intercourse between the states themselves, will advance the trade of each, by an interchange of their respective productions, not only for the supply of reciprocal wants at home, but for exportation to foreign markets. The veins of commerce in every part will be replenished, and will acquire additional motion and vigor from a free circulation of the commodities of every part. * * *

"It may perhaps be replied to this, that whether the states are united or disunited, there would still be an intimate intercourse between them which would answer the same ends: But this intercourse would be fettered, interrupted, and narrowed, by a multiplicity of causes; which in the course of these papers have been amply detailed. An unity of commercial, as well as political, interests, can only result from an unity of government." The Federalist, No. XI.

[2]The Federalist, No. XLV.

> venture to say that very great improvements, and very economical regulations, will be made. It will be a principal object to guard against smuggling, and such other attacks on the revenue as other nations are subject to. We are now obliged to defend against those lawless attempts; but, from the interfering regulations of different states, with little success. There are regulations in different states which are unfavorable to the inhabitants of other states, and which militate against the revenue: New York levies money from New Jersey by her imposts. In New Jersey, instead of co-operating with New York, the legislature favors violations on her regulations. This will not be the case when uniform regulations will be made."[3]

And yet, with all this, the States were not satisfied. Many of them coupled their ratifications with proposed amendments, including the substance of the present Tenth Amendment.[4] And one refused to ratify until after the Tenth Amendment should be adopted.[5]

That amendment provided then, and still provides now:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

9. Conclusions as to scope of interstate commerce clause.

These things can clearly be said as to the scope of the interstate commerce clause as disclosed by this review of the intent of those who framed, adopted and ratified it:

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[3]Madison before the Virginia Convention, 3 Elliot's Debates, 259-260.

[4]1 Elliot 322, 325, 326, 327.

[5]1 Elliot 331, 332; 4 Elliot 249.

(1) The grant intended and made by States acutely conscious of conflicting commercial and economic interests and jealous of strong central governments and of each other, is "to regulate commerce", —not to act in respect of such commercial or economic matters as to which State legislation should prove incompetent.

(2) The intention was to make commerce free among the several States.

(3) To that end, regulation of the instrumentalities of that commerce was contemplated.

(4) There was no intention to give to the Federal Government, or to a majority of States in the Congress thereof, the power to sacrifice, discriminate against or destroy the economic interests or life of any State or geographic area in order to promote majority interests, or those of the Nation as a whole.

PART IV.

THE DECISIONS OF THIS COURT ON THE COMMERCE CLAUSE SUPPORT AND ARE CONSISTENT WITH THIS VIEW.

1. The decisions of this Court recognize that under the power to regulate foreign commerce the Congress has broad authority absolutely to control or prohibit the movement of commodities into this country in foreign commerce; a power which it does not possess under the interstate commerce clause in respect of the movement of commodities from one State to another.

Within its scope, the power over interstate commerce is as absolute as the power over foreign commerce.[1] But, for the historical reasons just reviewed, the scope of the two powers is not the same, although both are conferred in the same clause of the Constitution and in the same language of grant.

Thus, under the foreign commerce power, the Congress has "a plenary power in respect to the exclusion of merchandise brought from foreign countries" (*Buttfield* v. *Stranahan,* 192 U. S. 470, 492); "so complete is the authority of Congress over the subject that no one can be said to have a vested right to carry on foreign commerce with the United States" (*The Abby Dodge,* 223 U. S. 166, 176, 177). Acting under the foreign commerce power, the Congress may "exclude merchandise at discretion" (*Buttfield* v. *Stranahan,* p. 493), "for any reason"

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[1] *Gibbons* v. *Ogden,* 9 Wheat. 1, 197; *Crutcher* v. *Kentucky,* 141 U. S. 47, 57; *Bowman* v. *C. & N. W. R. Co.,* 125 U. S. 465, 482; *Brown* v. *Houston,* 114 U. S. 622, 630.

(*Brolan* v. *United States,* 236 U. S. 216, 218); and the scope of this power is so thoroughly settled that contentions to the contrary "are so devoid of merit as to cause them to be frivolous" (*Weber* v. *Freed,* 239 U. S. 325, 329).

But this Court has said that an act of Congress excluding a commodity from a State or prescribing the conditions of its entry when it comes in from foreign commerce would be clearly good, and yet the self-same statute in respect of the self-same commodity would "plainly" be unconstitutional as applied to the movement of that commodity from one State to another. *The Abby Dodge,* 223 U. S. 166, 173.[2] The foreign commerce clause was there regarded as authorizing the Congress to exclude that commodity from the States at will, while the interstate commerce clause was deemed to give the Federal Government

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[2]In that case, a Federal statute made it unlawful to land in any place in the United States any sponges taken from the waters of the Gulf of Mexico or the Straits of Florida, except under certain conditions as to their size and the manner of their taking. *The Abby Dodge* was libeled and fined for landing sponges in Florida in violation of this law. The Court ruled that if the statute applied "to sponges taken or gathered from land under water within the territorial limits of the State of Florida or other States, the repugnancy of the act to the Constitution would plainly be established by the decisions of this Court" (p. 173). Not so, however, if the sponges were taken on the high seas, for then the vessel would be engaged in foreign commerce and the Congress "by an exertion of its power to regulate foreign commerce has the authority to forbid merchandise carried in such commerce from entering the United States" (p. 176). Although broad enough to cover sponges taken within the territorial waters of any State bordering upon the Gulf (p. 173), the statute was construed, to keep it from being "inevitably and plainly" unconstitutional (p. 175), as not applying to sponges taken in territorial waters of a State, and the decree was reversed, with leave to the Government to amend, if desired, to plead a case within the statute, as construed.

no authority either to prohibit or to condition the movement of the same commodity among the States of the Union.

"The authority of Congress to absolutely prohibit foreign importations as expounded by the decisions of this Court" rests, as stated in *Brolan* v. *United States,* 236 U. S. 216, 222, upon "the broad distinction which exists between the two powers"; and decisions respecting the scope of the one power "have obviously no relation" to the question as to the scope of the other (*ib.* p. 222).

Quite recently, in *Atlantic Cleaners & Dyers* v. *United States,* 286 U. S. 427, 434, a unanimous court took occasion to point out the distinction between the scope of the power over foreign and over interstate commerce and to note that the one power includes authority to place an embargo "in respect of legitimate and unobjectionable articles", while the other does not:

> "And, again in the Constitution, the power to regulate commerce is conferred by the same words of the commerce clause with respect both to foreign commerce and interstate commerce. Yet the power when exercised in respect of foreign commerce may be broader than when exercised as to interstate commerce. In the regulation of foreign commerce an embargo is admissible; but it reasonably cannot be thought that, in respect of legitimate and unobjectionable articles, an embargo would be admissible as a regulation of interstate commerce, since the primary purpose of the clause in respect of the latter was to secure freedom of commercial intercourse among the states. See *Groves* v. *Slaughter,* 15 Pet. 449, 505; *Steamship Co.* v. *Portwardens,* 6 Wall. 31, 32-33; *Buttfield* v. *Stranahan,* 192 U. S. 470, 492. Compare *Russell Motor Car Co.* v. *United States,* 261 U. S. 514, 520-521."

2. The holdings of this Court in cases involving the interstate commerce clause support and are consistent with this view of its limited scope.

The decisions of this Court applying the interstate commerce clause have been mindful of the *character* of the *preexisting*[1] rights intended to be preserved to the States and to the people by the Tenth Amendment, and not intended to be placed under Federal domination and control by the interstate commerce clause—that is, the right to engage in commerce in total disregard of State lines:[2] the right of free access to interstate markets and products.

Prohibitions or conditions upon interstate transportation.

Thus, in view of their nature and purpose, the grant and the reservation have not been regarded as denying to the Congress the power to police interstate commerce in order to keep it safe and free,—quite a different thing from "regulating" interstate commerce in such manner as to control or to destroy the economic life of the States. The Court has ruled that, consistently with the true purpose of the Constitution, a regulation of interstate commerce may "under some circumstances, properly take the form or have the effect of prohibition", but that the validity of such a prohibition must always be judged in the light of "the nature of the interstate traffic" which it seeks "to suppress" (*Champion* v. *Ames,* 188 U. S. 321, 355).

Applying this test of the police function of the Federal Government to impose prohibitions or conditions upon

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[1] *Gibbons* v. *Ogden,* 9 Wheat. 1, 211. See p. 153, *ante.*

[2] *West* v. *Kansas Natural Gas Co.,* 221 U. S. 229, 255; *Penna.* v. *West Virginia,* 262 U. S. 553, 599.

interstate movement for the purpose of keeping interstate commerce safe and free, the Court has sustained the validity of the Federal Cattle Quarantine Acts[1] by which the Congress assumed "to stop and regulate" interstate commerce in cattle by suitable inspection and treatment to eradicate diseases until such commerce "could be safely carried on", a function deemed appropriate to "preventing burdens to that commerce" by "the spread of disease from one State to another". (*Thornton* v. *United States,* 271 U. S. 414, 424, 425). The contention in that case that the power claimed by the Federal Government was "vested in the Legislature of the state under the reservations of the Tenth Amendment to the Federal Constitution" was summarily overruled (*ib.* p. 424).[2]

Upon the same ground, the Court has sustained statutes denying the facilities of interstate commerce to adulterated or misbranded foods and drugs,[3] articles dangerous in themselves. Like unquestioned authority has been exerted in regulating the interstate transportation of dangerous corrosive and caustic substances[4] and the various kinds of virus, serums and toxins.[5]

Similarly, the commerce power has been sustained as exerted in a series of statutes regarded as having "only supplemented"[6] the action of the States in the protection of

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[1]Acts of February 2, 1903, 32 Stat. 791, and March 3, 1905, 33 Stat. 1264.

[2]But in the absence of Federal regulation, a like statute of a State is not to be regarded as a burden upon interstate commerce. *Reid* v. *Colorado,* 187 U. S. 137, 151.

[3]*Hipolite Egg Co.* v. *U. S.,* 220 U. S. 45, 57, 58; *Weeks* v. *U. S.,* 245 U. S. 618, 622.

[4]Act of March 24, 1927, 44 Stat. 1906.

[5]Act of March 4, 1913, 37 Stat. 828.

[6]*Champion* v. *Ames,* 188 U. S. 321, 357.

the public morals by prohibiting the use of the channels of interstate commerce for the transportation of women for immoral purposes,[7] of stolen automobiles[8] and of lottery tickets.[9] And it was "in view of the nature and character of intoxicants",—that is, upon the consideration of the dangers inherent in that commodity itself,—that similar regulations of its interstate transportation by the Federal Government have been sustained, in supplement to State laws.[10]

The differences of opinion exhibited in the decision of the above cases were not bottomed upon doubt as to the rule and principle, but upon the application of the rule and the drawing of the line in particular cases. It will not be contended that if the Federal statutes sustained in those cases were properly regarded as mere provision for the protection of public health and the safety of life and limb, or as supplementing the criminal statutes of the States in the protection of the public morals, they are inconsistent with the purpose of the Constitution to provide that commercial life and intercourse in this country shall be carried on without regard to State lines,—as a right, and not as a mere privilege which may be granted or denied, contracted or conditioned, by the will of government, State or Federal.

The true bases of those decisions, and the true meaning of the Constitution, become apparent when it is considered

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[7] *Hoke* v. *United States*, 227 U. S. 308, 322; *Caminetti* v. *United States*, 242 U. S. 470, 491.

[8] *Brooks* v. *U. S.*, 267 U. S. 432, 436, *et seq.*

[9] *Champion* v. *Ames*, 188 U. S. 321, 355-357. A recent addition to this line of statutes is the "Lindbergh Law", punishing the use of channels of interstate commerce by kidnapers. See *Gooch* v. *U. S.* (decided February 3, 1936).

[10] *Clark Distilling Co.* v. *Western Maryland Ry. Co.*, 242 U. S. 311, 331, and *U. S.* v. *Hill*, 248 U. S. 420, 426; *In re Rahrer*, 140 U. S. 545.

that this Court has unanimously ruled that it is beyond the authority of the Congress under the Commerce Clause to prohibit or to condition the right to transport *sponges* in interstate commerce (*The Abby Dodge,* 223 U. S. 166, 173); that the right to do business in interstate commerce in the sale of *cotton yarns and cloths* has been regarded as not within the Federal power to prohibit (*Hammer* v. *Dagenhart,* 247 U. S. 251); and that quite recently in *Baldwin* v. *Seelig,* 294 U. S. 511, 525-527, a unanimous court held that a State may not prohibit the introduction into her territory of wholesome *milk* from other States; nor regulate the price at which that milk may be sold within its borders; nor deny the right to sell it therein in convenient receptacles, because to do so would have the effect:

> "of establishing an economic barrier against competition with the products of another State or the labor of its residents" (p. 527);
> to "set up what is equivalent to a rampart of customs duties designed to neutralize advantages belonging to the place of origin" (p. 527);
> "would neutralize the economic consequences of free trade among the States" (pp. 525-526),

—consequences which would assuredly follow from Federal action of like character as applied to the useful and wholesome commodity of bituminous coal, sold across State lines in this case without any showing or claim of fraud or deception.

And in the case last cited the Court reaffirmed the right of the States to prevent the importation into their borders, and the right of the Congress to prevent the movement in interstate commerce, of decayed or obnoxious food or unhealthy animals, and to protect the inhabitants of receiving

States from fraud and deception in respect of commodities imported in interstate commerce from other States (294 U. S. 511 at 525). It was the prohibition or conditioning of the right to sell *wholesome* commodities across State lines *without fraud or deception* which was found to be repugnant to the doctrine of "free trade among the States" embodied in the Commerce Clause.

These rulings make plain the grounds of this Court's recent observation in a unanimous decision,—an observation utterly at war with the Government's contention, as are the rulings in the several cases last discussed above:

> "it reasonably cannot be thought that, in respect of legitimate and unobjectionable articles, an embargo would be admissible as a regulation of interstate commerce, since the primary purpose of the clause in respect of the latter was to secure freedom of commercial intercourse among the states."[11]

Anti-Trust Acts—Sherman, Clayton and Federal Trade Commission Acts.

These statutes, enacted pursuant to the interstate commerce power,[1] afford no support for a view of that power as comprehending the fixing of prices at which commodities may move in interstate commerce. Quite the contrary.

The Sherman Act is *"a charter of freedom"* having "a generality and adaptability comparable to that found to be desirable in Constitutional provisions".[2] Its purpose, like that of the Commerce Clause itself, is to remove obstruc-

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[11] *Atlantic Cleaners & Dyers* v. *United States*, 286 U. S. 427, 434.

[1] Except in their relation to the District of Columbia and to the territories. *Atlantic Cleaners & Dyers* v. *U. S.*, 286 U. S. 427, 434.

[2] *Appalachian Coals, Inc.* v. *U. S.*, 288 U. S. 344, 359, 360.

tions to *"the free flow of commerce between the States"*[3] resulting from "contracts, combinations and conspiracies in restraint of trade";[4] which restrict "in that regard, the liberty of a trader to engage in business";[5] and to that end the Congress in enacting it meant "to exercise all the power it possessed".[6]

Again and again the Court has emphasized "that only such contracts and combinations are within the act as, by reason of intent or the inherent nature of the contemplated acts, prejudice the public interest by unduly restricting competition or unduly obstructing the course of trade";[7] that the purpose is the "frustration of all efforts unduly to restrain the *free course of interstate commerce*" "to prevent undue restraints of interstate commerce, to maintain its appropriate freedom in the public interest, to afford protection from the subversive or coercive influence of *monopolistic* endeavors";[8] to prohibit contracts and combinations which "limit or restrain" interstate commerce.[9]

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[3] *Loewe* v. *Lawlor,* 208 U. S., 274, 293.

[4] *Atlantic Cleaners & Dyers* v. *U. S.,* 286 U. S. 427, 435.

[5] *Loewe* v. *Lawlor, supra.*

[6] *Atlantic Cleaners & Dyers* v. *U. S.,* 286 U. S. 427, 435.

[7] *Nash* v. *U. S.,* 229 U. S. 373, 376. See *Standard Oil Co.* v. *United States,* 221 U. S. 1; *United States* v. *American Tobacco Co.,* 221 U. S. 106; *Chicago Board of Trade* v. *United States,* 246 U. S. 231, 238; *Window Glass Manufacturers* v. *United States,* 263 U. S. 403, 412; *Maple Flooring Association* v. *United States,* 268 U. S. 563, 583, 584; *Paramount Famous Corp.* v. *United States,* 282 U. S. 30, 43; *Standard Oil Co.* v. *United States,* 283 U. S. 163, 169.

[8] *Appalachian Coals, Inc.,* v. *U. S.,* 288 U. S. 344, 359, 360. Summarizing the cases under this statute, Black concludes: "The purpose of the statute is to permit interstate commerce to flow in its natural channels, unobstructed by any combinations, contracts, or monopolies, and its prohibitions apply to any contract or combination which stifles, obstructs, or directly and substantially restricts such commerce or free competition therein." (American Const. Law, 3d Ed., p. 237.)

[9] *Addyston Pipe & Steel Co.* v. *United States,* 175 U. S. 211, 229. In the course of that opinion, the Court remarked: "If Congress has

The Clayton Act and the Federal Trade Commission Act have like purposes. Each, this Court has pointed out, is directed at removing restraints put upon "the natural flow of commerce and the freedom of competition in the channels of interstate trade which it has been the purpose of all the anti-trust acts to maintain."[10]

Anti-Trust Acts—Prices

The Anti-Trust Acts have been applied to forbid certain practices in respect of prices. These exertions of the Federal commerce power have a purpose the antithesis of price fixing, and afford no precedent or support for the price regulations of the present statute, or for the view of

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not the power to legislate upon the subject of contracts of the kind mentioned, because the constitutional provision as to the liberty of the citizen limits, to that extent, its power to regulate interstate commerce, then it would seem to follow that the several States have that power, although such contracts relate to interstate commerce, and, more or less, regulate it. If neither Congress nor the state legislatures have such power, then we are brought to the somewhat extraordinary position that there is no authority, state or national, which can legislate upon the subject of or prohibit *such* contracts. This cannot be the case" (p. 231). This argumentative statement in answer to a due process argument, does not indicate any disposition to adopt the view that national power must exist wherever State power is impotent. The Court was speaking of "such contracts", *i.e.*, contracts limiting, restraining or burdening interstate commerce. As subsequently explained by the Court in *Appalachian Coals, Inc.* v. *United States*, 288 U. S. 344, at 375: "In *Addyston Pipe & Steel Co.* v. *United States*, 175 U. S. 211, the combination was effected by those who were in a position to deprive, and who sought to deprive, the public in a large territory of the advantages of fair competition, and was for the actual purpose, and had the result, of enhancing prices,—which in fact had been unreasonably increased (*id.*, pp. 237, 238)."

[10] *Federal Trade Commission* v. *Beech-Nut Co.*, 257 U. S. 441, 454; *Van Camp & Sons* v. *American Can Co.*, 278 U. S. 245, 254.

the scope of the Commerce Clause which the Government urges in their support.

Price Fixing: Agreements between competitors to fix and maintain uniform prices are violative of the Sherman Act whether the prices in themselves are reasonable or unreasonable.[1] The reason is that "the aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition. The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices"; and it is the object of the Sherman Act to protect against "the evils of monopoly and price control by the maintenance of competition."[2]

For the like reason, agreements for the maintenance of resale prices have been regarded as having for their purpose "the control of the entire trade"; and the public policy of the Sherman Act "in maintaining freedom of trade with respect to future sales after the article has been placed on the market and the producer has parted with his title," has condemned them, regardless of the reasonableness of the price.[3] Similarly, a scheme or plan for the enforcement of resale prices, necessarily resulting in its practical operation in the suppression of competition among retail distributors, is an unfair method of competition within the Federal Trade Commission Act.[4]

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[1] *United States* v. *Trenton Potteries,* 273 U. S. 392, 397.

[2] *Ibid,* p. 397.

[3] *Dr. Miles Medical Co.* v. *Park & Sons Co.,* 220 U. S. 373, 400, 403; *United States* v. *Trenton Potteries, supra,* at page 401.

[4] *Federal Trade Commission* v. *Beech-Nut Packing Co.,* 257 U. S. 441. But "the words 'unfair method of competition' are * * * clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud or oppression, or as against public policy because of their dangerous tend-

In *Addyston Pipe & Steel Co.* v. *United States,* 175 U. S. 211, 237, a combination of manufacturers in a scheme having the purpose and effect of fixing and increasing prices was held violative of the Sherman Act upon the same ground, and in *Swift & Co.* v. *United States,* 196 U. S. 375, competing meat packers were enjoined from combining, conspiring or contracting together either to raise, lower or fix uniform prices for the sale of their product in interstate commerce. These and other familiar cases are all based upon the ground that the inherent nature of a price-fixing agreement between competitors is a restraint upon the freedom of interstate trade. How far the doctrine of these cases is from supporting the statute at bar or the view of the Commerce Clause upon which the Government attempts to support it appears from the fact that the statute presently under review not only sanctions but commands competitors to enter upon an agreement to fix and maintain prices.

In *Local 167* v. *United States,* 291 U. S. 293, 295-297, a conspiracy of purchasing middlemen to allocate incoming commodities among themselves and to raise the price at which they should sell to retailers was found to be bottomed upon an intent, and in fact to result in, burdening and restraining the transportation of the commodity while it was still in interstate commerce. The Court noted that "The control of the handling, the sales and the prices at the place of origin before the interstate journey begins or in the State of destination where the interstate movement ends may operate directly *to restrain and monopolize interstate com-*

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ency unduly to hinder competition or create monopoly. The act was certainly not intended to fetter free and fair competition as commonly understood and practiced by honorable opponents in trade" *Federal Trade Commission* v. *Gratz,* 253 U. S. 421, 427.

merce"; and found that in the case then before it "The interference by appellants and others with the unloading, the transportation, the sales by marketmen to retailers, the prices charged and the amount of profits exacted *operates substantially and directly to restrain and burden the untrammelled shipment and movement of the poultry while unquestionably it is in interstate commerce."* The case, of course, affords no support whatever for price fixing, but directly condemns it as constituting a burden on "the untrammelled shipment and movement" of commodities "in interstate commerce".

The Sherman Act has not been regarded, however, as prohibiting competitors from openly and fairly exchanging full information as to costs and past prices with a view to the intelligent future conduct of their business, so long as they do not reach or attempt to reach any agreement or concerted action respecting prices. (*Maple Flooring Manufacturers Assn.* v. *United States,* 268 U. S. 563; *Cement Manufacturers' Protective Assn.* v. *United States,* 268 U. S. 588). Moreover, competing producers in a geographic portion of a wide-flung industry such as the bituminous coal industry may, during a period of depression, appoint a common selling agent with authority to set their prices, for the purpose of promoting the sale of their coal in fair competition and eliminating injurious practices within the industry; and this will not violate the Sherman Act where it appears that such agent must sell in a highly competitive market abundantly supplied with coal from other sources so that the plan could not result in, and could not be regarded as contemplating, the fixing of market prices.

(*Appalachian Coals, Inc.* v. *United States,* 288 U. S. 344, 373 *et seq.*).[5]

On the other hand purported "open competition plans" between competitors found to have the purpose and effect of restricting competition and increasing prices (*American Column & Lumber Co.* v. *United States,* 257 U. S. 377, 410), or to be directed to the secret dissemination of price information to competitive producers coupled with rebates and concessions to favored dealers (*United States* v. *American Linseed Oil Co.,* 262 U. S. 371), are restrictive of competition and violative of the Sherman law.

The purport of all these cases is simply this: that while price is recognized as a controlling factor in interstate trade in commodities, there has been no suggestion that either Governments or combinations of private persons may fix the prices at which commodities shall move in interstate commerce. On the contrary, it clearly appears that it has always heretofore been regarded that the freedom of that trade enjoined by the Constitution and sought to be protected and preserved by the Anti-Trust laws requires price competition, not price fixing. It is clear, therefore, that the Anti-Trust Acts, and the decisions of this Court under them in respect of price fixing, are consistent only with the view as to the purpose and scope of the interstate commerce clause presented in this brief, and that they afford no support whatever for the view advanced by the Government.

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[5]See also *Board of Trade* v. *United States,* 246 U. S. 231, holding not violative of the Sherman Act a call rule of the Chicago Board of Trade limiting the allowable period during the business day during which its members might make prices on a particular type of contract for the sale of grain, it being found the rule accommodated the convenience of the members, made for more adequate knowledge of market conditions in buying and selling, and had no appreciable effect upon general market prices.

Price Discrimination: Section 2 of the Clayton Act[6] proscribes price discrimination between different purchasers where its effect may be substantially to lessen competition or tend to create a monopoly in any line of interstate commerce, with exceptions in favor of discriminations on account of grade, quality, quantity, difference in selling or transportation costs, or discriminations made in good faith to meet competition, and reserving the right to select one's own customers "in bona fide transactions and not in restraint of trade".

This provision has been held to prohibit a large manufacturer of cans and can sealing machines from gross discrimination between packing companies in the sale of its cans and rental of its machines where the effect is to substantially lessen competition and tend to create a monopoly (*Van Camp & Sons* v. *American Can Company,* 278 U. S. 245). The ground of the decision is that in respect of persons engaged in the same lines of interstate commerce the statute regards competition as desirable, and that

[6]"It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly to discriminate in price between different purchasers of commodities, which commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce: *Provided,* That nothing herein contained shall prevent discrimination in price between purchasers of commodities on account of differences in the grade, quality, or quantity of the commodity sold, or that makes only due allowance for difference in the cost of selling or transportation, or discrimination in price in the same or different communities made in good faith to meet competition; *And provided further,* That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade."

"whatever substantially lessens it or tends to create a monopoly in such line of commerce is an evil",—a restraint upon "the freedom of competition in the channels of interstate trade which it has been the purpose of all the anti-trust acts to maintain" (*Ibid.*, p. 254).

Price Cutting: The lowering of prices has not, of course, been regarded as a restraint of trade under the anti-trust acts.[7] "Price cutting" under those acts has had a very narrow significance. "Local price cutting at the points where necessary to suppress competition" has been looked to as one element showing intent in cases involving the use of "fighting ships", "fighting brands" or "bogus independents" or similar expedients as part of a plan for the use of temporary expedients to stifle and destroy competition and to create a monopoly in interstate commerce.[8] Price cutting, combined with numerous similar devices used as temporary expedients to suppress competition, has been considered significant only as demonstrative "of a purpose to acquire dominion and control of the tobacco trade, not by the mere exertion of the ordinary right to contract and to trade, but by methods devised in order to monopolize trade by driving competitors out of business."[9]

These cases under the Anti-Trust Acts, those involving price fixing, price discrimination and price cutting, as well as those involving other practices burdening and obstructing the free flow of interstate commerce in a competi-

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[7] *U. S.* v. *International Harvester Co.*, 274 U. S. 693, 708.

[8] *Standard Oil Company* v. *United States*, 221 U. S. 1, 43, 75-77; *United States* v. *American Tobacco Company*, 221 U. S. 106; *Nash* v. *United States*, 229 U. S. 373; Compare *United States* v. *International Harvester Company*, 274 U. S. 693, 708.

[9] *United States* v. *American Tobacco Company*, 221 U. S. 106, 160, 181.

tive system, obviously offer no support for, and indeed are directly antithetical to, a claim of power to regulate the price of commodities solely because, and whenever, they cross State lines.

The Stafford, Olsen and Tagg Cases.

The decisions in these cases are thoroughly consistent with the view that the purpose of the Commerce Clause is to keep commerce free, and that it does not empower the Congress to fix the price at which commodities may move in interstate commerce.

Stafford v. *Wallace,* 258 U. S. 495, and *Tagg Bros. & Moorhead* v. *United States,* 280 U. S. 420, sustained the validity of the Packers & Stockyards Act of 1921. That Act provided for the Federal supervision of the business of the commissionmen, dealers and brokers (market agencies) in livestock at the great stockyards of the Nation, including Federal regulation of rates and charges for the services of such persons and for the use of the facilities of the stockyards and regulation of practices in connection with the passing of livestock through the yards.

By the statute there involved the Congress did not assume to regulate the price at which commodities may move in interstate commerce, or to regulate the price of commodities at all. It sought only to regulate the price for personal services rendered in the course of the flow of interstate commerce from the farms of the West through the stockyards to the consuming centers of the East. As pointed out in the *Tagg Bros.* case, the persons affected by the price regulations enjoyed a substantial monopoly in the performance of those services (280 U. S. 438, 439); and there was

no claim of any authority to regulate the wage or charge for those services merely because they occurred in the course of a flow of commerce, but on the contrary, the statute was based, was defended, and was sustained as one whose purpose was to prevent excessive charges for these "monopolistic personal services" which would constitute "an undue burden upon, and obstruction of [interstate] commerce" (280 U. S. 438, 439).

In addition to the purpose to prevent monopoly, the cases are also based upon the prevention of deceptive practices and fraudulent charges against the interstate shipper which constituted "an undue burden on the commerce which the stockyards are intended to facilitate" (258 U. S. 514, 515). The statute was the outgrowth of the decision in *Swift & Co.* v. *United States,* 196 U. S. 375, in which the great meat packers had been found guilty of a combination to monopolize interstate commerce in meat products in violation of the Sherman Act. The Packers & Stockyards Act was intended to make the decree in the *Swift* case more effective (258 U. S. 520), and thereby to promote "the free and unburdened flow of livestock" in interstate commerce (p. 514),—the very antithesis of the purpose and effect of the statute now at bar. The packers, whose combination had been enjoined in the *Swift* case, had come into the possession of the stockyards constituting both the receiving depots for the movement of livestock in interstate commerce and the markets at which it was sold. They controlled such markets and had a whip hand over the commissionmen, acting as intermediaries in the sale of livestock. Not only, therefore, were the elements of monopoly present both in respect of the use of the facilities and the services of the commissionmen, dealers and brokers, but it ap-

peared that exorbitant charges, duplication of commissions, and deceptive practices in respect of prices were all made possible by collusion between the packers and the commissionmen and the packers and the dealers (258 U. S. 515).

The statute is very clearly an anti-trust act of specialized application, and has since been explained on that ground.[1]

Chicago Board of Trade v. *Olsen,* 262 U. S. 1, sustained the validity of the Grain Futures Act of 1922. The statute dealt with regulation of the business of the members of the Chicago Board of Trade, the greatest grain market in the world, upon which the grain of the western and northern States is sold. This grain is shipped from the western and northern States to a temporary storage in Chicago, but after sale it is shipped in large part to eastern States and foreign countries. The Act does not attempt to regulate either the price of any commodity or the price of any service. It prescribes rules to be observed by the members of the Board in their market dealings, the requirements providing for the keeping of records of all sales; the prevention of dissemination of misleading prices; the prevention of manipulation of prices or the cornering of grain; and the requirement that cooperative associations of producers shall be admitted as members to the Board.

It was ruled that the case involved a current or flow of interstate commerce just as in *Stafford* v. *Wallace,* 258 U. S. 495; and the regulations were sustained as appropriate measures to prevent direct burdening of the normal flow of interstate commerce in grain by manipulation of

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[1] *Atlantic Coast Line Railroad Co.* v. *Standard Oil,* 275 U. S. 257, 272.

grain futures for speculative profit which was found to result in "abnormal and disturbing temporary fluctuations of prices that are not responsive to actual supply and demand" and disturb "the normal flow of actual consignments" of grain (p. 39).

The purpose of the Act, therefore, was not to suppress or do away with competition or to fix prices. On the contrary it was to remove obstructions occurring in the course of a flow of interstate commerce which prevented the normal operation of competitive price adjustment.

Attempts by States to prohibit interstate purchase and sale of commodities or to fix the price or otherwise directly to regulate the conditions upon which they may be made.

The *West, Pennsylvania, Foster, Baldwin, Lemke* and *Shafer* cases.

"Buying and selling and the transportation incidental thereto constitute commerce" (*Kidd* v. *Pearson,* 128 U. S. 1, 20); and such buying and selling constitute interstate commerce where the contemplated incidental transportation is interstate, whether the transaction be one of purchase for transportation, or of transportation for sale in the receiving State (*Dahnke-Walker Co.* v. *Bondurant,* 257 U. S. 283, 291). This rule has been applied to contracts for the sale of coal f. o. b. mines which contemplate transportation to ultimate purchasers in other States,—at least where the seller takes the bills of lading in the buyer's name and consigns the coal to the buyer's customers in other States (*Flanagan* v. *Federal Coal Co.,* 267 U. S. 222).

Since the doing of interstate business is a right protected by the Constitution, a State statute which "imposes

a direct burden upon the plaintiff's right to engage in interstate commerce * * * is in violation of its constitutional rights" (*International Text Book Co.* v. *Pigg,* 217 U. S. 91, 112). Thus, State statutes attempting to deny to foreign corporations the right to enter into contracts of interstate purchase and sale except upon complying with the statutory requirements for doing an intrastate business (*Dahnke-Walker Co.* v. *Bondurant*) or denying an individual the right to enter into such contract without taking out a dealer's license under local law (*Flanagan* v. *Federal Coal Co.*) are unconstitutional as constituting direct burdens upon interstate commerce.

Putting to one side cases of incidental restraint involved in the enforcement of local pure food or game laws,[1] there are six leading cases in which States have attempted to prohibit interstate contracts of purchase and sale of ordinary wholesome commodities or to fix the price at which such commodities may be sold in interstate commerce, or otherwise directly to govern such transactions. In each of these cases the State statute has been held to be violative of the Commerce Clause, as constituting a direct burden upon the free flow of interstate commerce in ordinary wholesome commodities.

In *West* v. *Kansas Natural Gas Co.,* 221 U. S. 229, the Court held invalid an Oklahoma statute prohibiting the transportation to points in other States of natural gas acquired in that State. The statute was not one regulating the production of natural gas to prevent physical waste,

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[1] *Crossman* v. *Lurman,* 192 U. S. 189; *Savage* v. *Jones,* 225 U. S. 501; *Price* v. *Illinois,* 238 U. S. 446; *Plumley* v. *Massachusetts,* 155 U. S. 461; *Asbell* v. *Kansas,* 209 U. S. 251; *Hebe Co.* v. *Shaw,* 248 U. S. 297; *Mintz* v. *Baldwin,* 289 U. S. 346; *Hygrade Provision Co.* v. *Sherman,* 266 U. S. 497; *Silz* v. *Hesterberg,* 211 U. S. 31; See *Baldwin* v. *Seelig,* 294 U. S. 511, 525.

but was one limiting its use to intrastate commerce upon the plea that such gas was the only practical usable fuel available in Oklahoma; that its supply was exhaustible and rapidly being exhausted, and that it was necessary to retain it for the use of the people of the State. As the Court pointed out, "the purpose of its conservation is in a sense commercial—the business welfare of the State, as coal might be, or timber" (p. 255). After pointing out that the result of the acceptance of such a view of State power would permit each State to keep its products of whatever kind and retaliate embargo with embargo, with the result of halting commerce at State lines, the Court ruled that in matters of interstate commerce there are no State lines; that:

> "In such commerce, instead of the States, a new power appears and a new welfare, a welfare which transcends that of any State. But rather let us say it is constituted of the welfare of all of the States and that of each State is made the greater by a division of its resources, natural and created, with every other State, and those of every other State with it. This was the purpose, as it is the result, of the interstate commerce clause of the Constitution of the United States. If there is to be a turning backward it must be done by the authority of another instrumentality than a court" (pp. 255, 256).

The opinion may be searched in vain for any suggestion that it was within the power of the Congress under the Commerce Clause to enact the measure thus held to be put beyond State power by the Commerce Clause.

In *Pennsylvania* v. *West Virginia*, 262 U. S. 553, this Court, on the authority of the *West* case, held unconstitutional a West Virginia statute requiring producers of

natural gas in that State to give preference in the sale and disposal of it to consumers of it in that State, the result being to withdraw from interstate commerce a large volume of gas theretofore moving therein from West Virginia wells. The Court said:

> "Natural gas is a lawful article of commerce and its transmission from one State to another for sale and consumption in the latter is interstate commerce. A state law, whether of the State where the gas is produced or that where it is to be sold, which by its necessary operation prevents, obstructs or burdens such transmission is a regulation of interstate commerce,—a prohibited interference. [Cases.] The West Virginia act is such a law. Its provisions and the conditions which must surround its operation are such that it necessarily and directly will compel the diversion to local consumers of a large and increasing part of the gas heretofore and now going to consumers in the complainant States, and therefore will work a serious interference with that commerce" (pp. 596-597).

The opinion contains no intimation that the Federal Government could enact the statute thus held to be beyond the power of the State.[2]

In *Foster Packing Co.* v. *Haydel,* 278 U. S. 1, a Louisiana statute prohibited the exportation of shrimp from the State unless the heads and hulls were removed and

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[2]The general statement in the opinion that the act of the State is an assumption of "power to regulate interstate commerce" which "power is lodged elsewhere" (p. 598) cannot be regarded as a suggestion that a prohibition upon the interstate movement of gas would be a regulation of interstate commerce within the power of the Congress, especially in view of the fact that the Court quoted with approval the language of the *West* case given in the text above to the effect that the States, by joining the Union, have divided their resources with all the other States.

conserved for use as fertilizer and chicken feed. After noting with approval the rule of the *West* and *Pennsylvania* cases and noting the exception in favor of the State's right to conserve its wild game for the benefit of the people, the Court found that the stated purpose of conservation was feigned and that the real purpose of the statute, as shown by its terms and by the evidence, was to prevent the interstate movement of raw shrimp to the packing and canning industries in Mississippi, thus by commercial necessity forcing the removal of those industries to Louisiana. It was therefore ruled that the statute constituted a direct obstruction and burden upon interstate commerce and was invalid.

In this third case of an attempt by a State to favor its business interests and economic position by a prohibition upon interstate commerce, the Court struck the State statute down, and its opinion contains not the slightest suggestion that the power there denied the State could be exercised by the Federal Government as a regulation of interstate commerce.

The same result was reached when a receiving State sought to regulate the price at which an ordinary wholesome commodity imported from other States might be sold. In *Baldwin* v. *Seelig,* 294 U. S. 511, 521 *et seq.,* a receiving State sought to outlaw wholesome milk imported from other States "by prohibiting its sale thereafter if the price that has been paid for it to the farmers" of the State of origin were less than the farmers' price for the same commodity obtaining in the receiving State. The statute thus sought to regulate the price at which milk imported from other States might be sold, whether in the original package or after transfer to smaller receptacles.

The statute was held invalid in all its aspects, as a direct and unconstitutional burden upon interstate commerce. The Court overruled the contention that the statute was a sanitary measure, and characterized it as one to "neutralize advantages belonging to the place of origin" (p. 527); to "neutralize the economic consequences of free trade among the States" (p. 526); and as one in which the State had assumed "in order to promote the economic welfare of [New York] farmers [to] guard them against competition with the cheaper prices of Vermont" (p. 522).

Again the opinion contains no suggestion that the Federal Government is empowered by the interstate commerce clause to enact the measure thus held to be beyond the power of the State.

After adverting to the fact that the records of the Federal Convention show that one of the chief occasions for the commerce clause was "the mutual jealousies and aggressions of the States, taking form in customs barriers and other economic retaliation", the Court stated:

> "If New York in order to promote the economic welfare of her farmers, may guard them against competition with the cheaper prices of Vermont, the door has been opened to rivalries and reprisals that were meant to be averted by subjecting commerce between the states to the power of the nation" (p. 522).

In thus referring to "the power of the nation" over "commerce between the states", the Court clearly had reference to the power to maintain freedom of trade among the States, entrusted to the Federal Government by the Constitution. Clearly, it could not have been meant to suggest that the Federal Government could, by a price regulation

"neutralize the economic consequences of free trade among the states" (p. 526). It could not have been meant to intimate that the Federal Government "in order to promote the economic welfare of [New York] farmers, may guard them against competition with the cheaper prices of Vermont" (p. 522). Clearly, there was no purpose to rule by indirection that the commerce power of the Federal Government may be used to foster the interests of business or labor in any State or portion of the country, by regulating the prices at which commodities may cross State lines, "with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents" (p. 527). For what purpose did the Court refer to the "advantages belonging to the place of origin" and point out that the Commerce Clause forbade the receiving State "to neutralize" them (p. 527), if it is within the competence of the Federal Government to destroy those advantages by a "regulation" of interstate commerce? It is not to be thought that the Court intended to suggest that, by regulating the price at which commodities may be permitted to cross State lines, the Federal Government could itself set "a rampart of customs duties" at State lines, thereby accomplishing what the opinion states to have been "a chief purpose" of the Commerce Clause to prevent.

It appears from the four cases just reviewed that the Commerce Clause forbids any State to prohibit the purchase or sale of ordinary wholesome commodities in interstate commerce, or to fix the price at which such commodities may be purchased or sold in such commerce, with a view to the promotion of its own economic or business interests; and that such State statutes offend the Commerce

Clause whether they be those of a receiving State seeking to keep its own markets for its own products or those of a producing State seeking to keep its own products for its own markets. It further appears that the opinions of this Court in these cases contain no suggestion that the Federal Government, in disregard of the purpose of the commerce clause, can burden interstate commerce in the very manner which the States are thus forbidden to do. On the contrary, petitioner submits that the grounds upon which these decisions were placed necessarily require the ruling, if they do not in effect constitute a ruling, that the Federal Government is likewise without such power.

This conclusion becomes inescapable, we submit, when the remaining two cases are considered.

In *Lemke* v. *Farmers Grain Co.*, 258 U. S. 50, it was held "that the delivery and sale of wheat by farmers to local grain elevators in North Dakota to be shipped to Minneapolis, when practically all the wheat purchased by such elevators was so shipped and the price was fixed by that in the Minneapolis market less profit and freight, constituted a course of business and determined the interstate character of the transaction. Accordingly a state statute which sought to regulate the price and profit of such sales[3] and was found to interfere with the free flow of interstate commerce, was declared invalid as a violation of the commerce clause."[4]

The State defended the statute upon the ground that it was "in the interest of the grain growers, and essential to protect them from *fraudulent purchases*" (pp. 60-61);

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[3]Other provisions of the Act in respect of grading, inspection and weighing were found to be inseparable, and fell for that reason. 258 U. S. at p. 60.

[4]*Stafford* v. *Wallace*, 258 U. S. 495, at 519.

and it was asserted that to strike down the law would leave "the farmers of North Dakota defenseless" against "persistent, palpable frauds" (p. 65). It was urged that under the conditions upon which the interstate purchase and sale of the grain was carried on the seller was at the mercy of the buyer and was being imposed upon in respect of price, weight, etc. (p. 63). It was in *that* connection that this Court made its first affirmative suggestion that the power of the Federal Government was adequate to deal with the matter although that of the States was not. Said the Court:

> "This may be true, but Congress is amply authorized to pass measures to *protect* interstate commerce if legislation of that character is needed. The supposed inconveniences and wrongs are not to be redressed by sustaining the constitutionality of laws which clearly encroach upon the field of interstate commerce placed by the Constitution under federal control" (258 U. S. at p. 61).

It thus appears that it is in connection with the existence of *fraud* in interstate commerce that the Court has suggested that the Federal power under the Commerce Clause is ample. No one doubts this. That power has been exercised under the Anti-Trust Acts for many years. The Court did *not* say that the Congress could prohibit the movement of ordinary wholesome commodities in interstate commerce, or that it could regulate the price at which they should be permitted to move. The only statement is that the Congress is empowered to keep interstate commerce in the purchase and sale of commodities free from fraud. The precise language of the above statement and the circumstances under which it was made are doubly significant in view of the fact that no similar suggestion was made by

the Court in the four cases previously reviewed, in which it held invalid State statutes prohibiting the purchase and sale, or attempting to fix the price of the purchase and sale, of commodities moving in interstate commerce, where done for the purpose of enhancing the commercial interests of a State and neutralizing the commercial advantages of another State.

The statement of the Court in the *Lemke* case, therefore, can in no view be regarded as recognizing an authority in the Congress to set the price of commodities merely because they cross State lines, or indeed to fix the prices of commodities for any reason. It is merely a reiteration of the long-established doctrine that it is for the Congress to enact appropriate legislation to remove burdens and restraints, whether those of States or of individuals, attempted to be imposed upon the free flow of interstate commerce.

A like statement was made by the Court in the remaining case, *Shafer* v. *Farmers Grain Co.*, 268 U. S. 189. That case dealt with a later statute of North Dakota (North Dakota Grain Grading Act) "having the same general purpose" (p. 191) as the statute held invalid in the *Lemke* case. Outright fixing of the sale price was not attempted, but the State assumed through its agents "to supervise and regulate the marketing" of wheat in order to prevent "unjust discrimination, fraud and extortion in the marketing", and authorized a State supervisor to investigate and supervise the marketing "in a general way" "with a view to prevent unjust discrimination, unreasonable margins of profit, confiscation of valuable dockage,[5] fraud and other unlawful practices" (pp. 195, 196). The Act required the interstate buyers to buy by grade, to give bond for the purchase price

[5]A by-product.

unless they paid cash, to keep and submit records, and the like matters.

This statute, likewise, the Court condemned as a direct burden and restraint upon interstate commerce. But, since the object of the statute was the prevention of *fraud*,—not the enhancement of the economic position of the State at the expense of its neighbors—the Court took occasion again to point out that the power to keep interstate commerce free from fraud resided in the Congress—

> "If the evils suggested are real, the power of correction does not rest with North Dakota but with Congress, where the Constitution intends that it shall be exercised with impartial regard for the interests of the people of all the States that are affected" (p. 202).

Here, again, the direct suggestion of the existence of Federal power is made; and here, again, it is made in connection with the prevention of fraud. Here, too, the language used is apt to indicate the true scope and extent of the Federal power as one to remove burdens and restraints to the free flow of interstate commerce. There is no suggestion that the Federal Government may, for economic reasons or for any reason, prohibit the movement of ordinary wholesome commodities across State lines or fix the price at which such commodities may so move.

Consideration of these cases must make it clear, we submit, that the contention that the Federal Government must have a prohibitory or price fixing power in respect of the movement of ordinary wholesome commodities between the States because the States have no such power is utterly without merit. What the cases do establish, and all that they establish, is that the Federal power is competent to eradicate fraud in the interstate purchase and sale of commodities, thereby keeping that commerce free.

The cases do not suggest that the Federal power extends to prohibiting altogether the interstate sales of such commodities or the fixing of the price at which they may be made. The cases do make clear that if, in some extraordinary circumstance, the fixing of prices of commodities in interstate sales should be necessary in order to prevent fraud, destruction of competition, or monopoly, and to keep commerce free, the power exercised would not be a power to fix the price at which commodities may be sold solely because they move in interstate commerce, but would be the use of price fixing as a means to remove those familiar burdens from interstate commerce. We do not mean to suggest or admit that price fixing of commodities by the Federal Government can ever be justified, even as a means of removing burdens. We have been unable to suppose a case in which price fixing of commodities would be necessary or appropriate for such an end.[6] But, at the very least, it is clear that the absolute power claimed by the Government to fix the prices of commodities upon the sole ground that they move in interstate commerce, finds no support whatever in the cases.

Regulation of Rates of Instrumentalities of Interstate Commerce.

The conceded authority of the Congress under the Commerce Clause over the instrumentalities of interstate

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[6]This Court has repeatedly held that state price-fixing statutes cannot be supported upon the theory that they prevent "fraud, extortion, or collusive arrangements" (*Tyson* v. *Banton*, 273 U. S. 418, 442, 443) or upon the ground that they prevent attempted destruction of competition and erection of monopoly (*Fairmont Creamery Co.* v. *Minnesota*, 274 U. S. 1, 10), pointing out that price-fixing statutes which necessarily include the innocent as well as the guilty cannot be regarded as having any substantial relation to the suppression of such evils. See, also, *Adams* v. *Tanner*, 244 U. S. 590, 594.

commerce[1], including the authority to regulate rates in order to prohibit unjust charges, discriminations or preferences[2] and for the purpose of providing transportation systems adequate to the needs of the country[3], of course affords no support for the view that the Commerce Clause includes a power to fix the price at which commodities may be permitted to be sold across State lines.

A railroad rate is not the price of a commodity; it is the price for transportation. In regulating the rates for such transportation in interstate commerce the Congress is but taking care that these agencies or instrumentalities of interstate commerce "shall not be used in such manner as to cripple, retard or destroy it"; that they shall not "obstruct the freedom of movement of interstate traffic over their lines".[4]

In order to keep free not merely the channels of interstate commerce but the very instruments in which commerce is carried in those channels, the power of the Congress has been deemed to extend to the prohibition of discriminations through the subterfuge of the carriers acting as both seller and carrier[5] and to the regulation of the intrastate activities of carriers which discriminate or impose burdens upon interstate traffic.[6]

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[1]*The Daniel Ball,* 10 Wall. 557, 565.

[2]*Interstate Commerce Commission* v. *Brimson,* 154 U. S. 447, 472.

[3]*Wisconsin R. R. Comm.* v. *C. B. & Q. R. R. Co.,* 257 U. S. 563, 589.

[4]*Houston & Texas Ry.* v. *United States,* 234 U. S. 342, 351, 355.

[5]*United States* v. *Delaware & Hudson Co.,* 213 U. S. 366; *New Haven R. R. Co.* v. *I. C. C.,* 200 U. S. 361.

[6]*Houston & Texas Ry. Co.* v. *United States,* 234 U. S. 342; *R. R. Com. of Wisconsin* v. *C. B. & Q. R. R.,* 257 U. S. 563; *Colorado* v. *United States,* 271 U. S. 153.

Rates for Interstate Sale and Transmission of Gas and Electricity.

Interstate sale and transmission of electric energy and gas involve both the sale of a commodity and the rendering of an exclusive transportation service in interstate commerce. Both as to commodity and as to transportation service such businesses, ordinarily, are at least geographically monopolistic of markets. Should it be determined, when the question is presented,[1] that rates for such sale and service are subject to federal regulation as are the rates of instrumentalities such as railroads, telegraph or telephone companies, it would seem clear that in view of its special grounds, as above stated, such a conclusion would leave untouched the contention here under consideration.

The Nebbia Case.

Nebbia v. *New York*, 291 U. S. 502, heavily relied upon by the Government in support of, and by the court below in sustaining, the price fixing provisions of the present Act (R. 1192-1193), obviously has no bearing on the issue as to the scope of the Federal power over interstate commerce. The State statute there involved made no pretense of regulating commerce, intrastate or otherwise, but was frankly labeled what it was, *i.e.*, a statute to regulate the milk industry within the State of New York by price fixing, as "a temporary expedient to redress an injurious economic condition" (*Borden's Farms Products Co.* v. *Ten Eyck*, decided Feb. 10, 1936, p. 5). The only question decided was whether the State statute—an exercise of the States' reserved power to provide, in any manner not prohibited

[1]See *Public Utility Commission of R. I.* v. *Attleboro Steam & Electric Co.*, 273 U. S. 83; *Peoples Gas Co.* v. *Public Service Commission*, 270 U. S. 550.

to it, for the general welfare of its people[2]—was violative of the guaranties of liberty and equal protection contained in the Fourteenth Amendment.

The fallacy of relying upon decisions respecting constitutional restrictions upon the broad reserved powers of the States as any criteria for determining the scope of the granted powers of the United States has too pointedly and recently been reiterated by this Court to bear restatement.[3] The impropriety of any such test is especially clear in the present instance, where the State statute purports to regulate an industry, and the Federal statute, we are told, regulates interstate commerce.

CONCLUSION AS TO GOVERNMENT'S PRIMARY ARGUMENT IN SUPPORT OF THE PRICE REGULATIONS

The argument is that, solely because bituminous coal is sold for consumption in other than the State of production, and therefore necessarily crosses State lines, the Congress may regulate the price at which it may be sold. We have seen that this would result in placing "customs barriers" between States; that its effect is to outlaw and prohibit the interstate sale and transportation of coal except at Federally fixed prices; that it would "neutralize the economic consequences of free trade among the States", if not destroy that trade; and that it would place the prosperity, the continued growth, the very existence of the economic life of the States, and the prosperity of their

[2] *Home Bldg. & Loan Assn.* v. *Blaisdell*, 290 U. S. 398.

[3] *Retirement Board* v. *Alton R. Co.*, 295 U. S. 330, 347, 367, 368; *United States* v. *Butler*, decided Jan. 6, 1936, p. 6; *cf. Baldwin* v. *Seelig*, 294 U. S. 511.

peoples, within the unfettered control of the Federal Government, without even any provision for uniformity in the exercise of that vast power.

We submit that every teaching of the documentary history of the formation, adoption and ratification of the Constitution and of its contemporaneous construction repels the suggestion that the power over interstate commerce was ever intended as conferring so vast an authority upon the central Government, and that on the contrary that history discloses that such authority was intended to be reserved to the States and to the people.

No recorded judgment of this Court supports the view that the Federal Government possesses this power, but on the contrary the decisions to which we have referred and which we have discussed in the preceding sections of this brief disclose the want of any such power.

We submit, finally, upon this point, that had anyone expressly proposed in the Constitutional Convention that the Federal Government be given the power to determine the price at which sales of commodities might be made across State lines, he would have received the same answer from all quarters as did Hamilton's brilliant speech in that Convention in support of a National as opposed to a Federal form of government, that is to say, it would have been recorded that: "though he has been praised by every body, he has been supported by none",[1] or, as more quaintly recorded in the notes of another Convention member:

> "The Gentleman from NYk is praised by every gentleman, but supported by no gentleman—He goes directly to ye abolition of the State Governts. and the erection of a Genl. Govt."[2]

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[1]Yates, I Farrand 363, reporting Dr. Johnson's speech.
[2]King, I Farrand 366, do.

POINT VI.

THE PRICE FIXING PROVISIONS CANNOT BE SUSTAINED AS A MEANS FOR CARRYING INTO EXECUTION THE POWER TO REGULATE COMMERCE.

1. The question here presented is whether the price fixing provisions are means naturally and reasonably adapted to accomplish ends within the scope of the commerce power.

The ultimate findings of the court below appear to indicate that its decision sustaining the price fixing regulations may be based upon the ground that they are appropriate means for removing burdens and restraints upon interstate commerce[1]; and this was the second ground upon which the Government sought to support these regulations in the court below.[2] The contention here is not that the price provisions are authorized by the commerce clause upon the sole ground that the coal moves in interstate commerce, but that regulation of the price of coal is an appropriate means under the necessary and proper clause[3] to carry out the object of the commerce grant by removing direct burdens and obstructions upon interstate commerce. This necessarily presents the questions as to the objects and

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[1]FF. 176-185; R. 209-212. Compare opinion, R. 1181-1195, and see footnote 4, p. 133, *ante*.

[2]See footnote 1, p. 133, and pp. 23, 28 *ante*.

[3]Constitution, Art. I, Sec. 8, Cl. 18. As pointed out in *Ruppert* v. *Caffey*, 251 U. S. 264, 299-301, the power of the Congress to regulate the rates of interstate carriers (*American Express Co.* v. *Caldwell*, 244 U. S. 617) is bottomed upon the necessary and proper clause, and it is necessary to bear in mind that this clause is in itself a distinct and express grant of power in order to "avoid confusion of thought".

scope of the interstate commerce power (examined in Point V, *ante*) and as to whether the price regulations are means reasonably related to the accomplishment of those objects.

The express, although general, grant of power in the necessary and proper clause,[4] authorizing the Congress to select the means by which it shall execute its express but specific powers, "vests in Congress a wide range of discretion as to the means by which the powers granted are to be carried into execution,"[5] and it is not the province of the Court to declare such means inexpedient or unwise.[6]

However, the means employed in the statute must be germane to the execution of the specific powers granted to the Congress. The general legislative power under the necessary and proper clause must always be exercised in subjection to the paramount rule that the *end* of the statute must be "within the scope" of the specific power sought to be executed, and that the means chosen must be such as are "naturally and reasonably adapted" to the accomplishment of *that* "legitimate" end.[7] Otherwise the door is open to the exercise of authority not granted by the Constitution, and there is an end of the doctrine of enumerated powers, for the exercise of the general power will have rendered nugatory the enumeration of specific powers.

The governing principles, therefore, to be applied in considering this second argument in support of the price

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[4] *Ruppert* v. *Caffey*, *supra*, at p. 300; *Legal Tender Cases*, 12 Wall. 457, 550.

[5] *Fairbank* v. *U. S.*, 181 U. S. 283, 287; *Northern Securities Co.* v. *U. S.*, 193 U. S. 197, 343.

[6] *Logan* v. *U. S.*, 144 U. S. 263.

[7] *M'Cullough* v. *Maryland*, 4 Wheat. 316, 421, 423; *Linder* v. *United States*, 268 U. S. 5, 17. See *U. S.* v. *Dewitt*, 9 Wall. 41; *Keller* v. *U. S.*, 213 U. S. 138; *Retirement Board* v. *Alton R. Co.*, 295 U. S. 330, *U. S.* v. *Butler* (decided Jan. 6, 1936).

fixing provisions are: (a) that the *end* of the statute must be the accomplishment of an object within the *scope* of the commerce power, and (b) that the *means* selected by the statute must be naturally and reasonably adapted to the accomplishment of *that* end.

As pointed out in Point II, *ante*, the regulatory provisions of the statute and of the Code, as a whole, constitute a patent attempt purposefully to accomplish an unconstitutional end, *i.e.*, the regulation of production, not of interstate commerce. A particular consideration of the avowed ends of the price regulations, considered alone, confirms this view and discloses that they are means "plainly inappropriate and unnecessary" to accomplishment of the *objects*[8] of the commerce power.

The "burdens" and "obstructions" which the price regulations are said to be intended to remove, as disclosed in the ultimate findings of the court below, are treated in pertinent respects in the sections which follow.[8a]

2. "Shifts", "dislocations" and "diversions" of the "normal" flow of interstate commerce in coal.

The court below has found that "small variations" in mine price may cause "large variations" in shipments as between producing areas and States, and as between mines, to points of consumption in the same or other States (Finding 176, R. 209), and that cutting of wage rates has "permitted disparities in price" which have "in turn" "shifted, diverted and dislocated the normal flow of coal in interstate commerce" (Finding 182, R. 211). In view of the extreme

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[8] *Linder* v. *United States*, 268 U. S. 5, 18.

[8a] See also Statement, pp. 6-9, *ante;* Review of Evidence, pp. 28-62, *ante;* and Point II, at pp. 103-112, *ante*.

ambiguity, complexity and impracticability of the provisions of the Code for the coordination of prices, it is open to serious question whether the price fixing provisions are reasonably adapted to prevent shifts and diversions of interstate commerce in coal, or whether they will not on the contrary operate to cause such shifts and diversions.[1] In *Borden's Farm Products Co.* v. *Ten Eyck* and *Mayflower Farms, Inc.* v. *Ten Eyck* (decided February 10, 1936), relating to State price fixing in the milk industry within New York, the Court had occasion to note the difficulty of avoiding "dislocations" and discriminations in attempting to substitute price control for competitive effort. As the Court stated in the *Borden's* case:

> "The present case affords an excellent example of the difficulties and complexities which confront the legislator who essays to interfere in sweeping terms with the natural laws of trade or industry. The danger in such efforts always is that unintended dislocations will bring hardships to groups whose situation the broad rules fail to fit."

It can hardly be supposed that the complicated and yet vague price fixing and coordination provisions of the present statute in the infinitely more complicated matter of fixing a nation-wide series of prices in the bituminous coal industry will result in preventing dislocations, diversions or shifts of business as between areas, States or mines.

Assuming, however, that the price-fixing provisions are reasonably adapted to "freeze" the existing distribution of markets as between producing States, areas and mines (*if* the present competitive distribution is what is meant by "normal"), nevertheless, the accomplishment of that end

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[1]See pp. 17-18, *ante*.

is not within the objects and purposes for which the power to regulate commerce was granted to the Congress. This has been fully discussed in the preceding Point. If, therefore, the price fixing provisions be regarded as reasonably related to the accomplishment of the end of freezing the existing distribution of markets between States and producers, yet that end is not within the scope of the commerce power.

3. Sales below cost of production.

The next finding in respect of the price provisions is that price cutting has existed in the coal industry for many years, with the result that the average price realized by producers of bituminous coal has in recent years been less than average cost of production (FF. 179, R. 210). The evidentiary findings and the evidence itself will be searched in vain for any suggestion that the "price cutting" here referred to by the Court was for the purpose of destroying competition or creating a monopoly. On the contrary, as already pointed out in the Summary Statement, *ante*, it is not disputed that there is no possibility of monopoly in the bituminous coal business, that there has been no attempt at it, and, similarly, that the existing over-production and the potential capacity of existing as well as of undeveloped mines is such that the destruction of competition in this business is impossible. What is meant by price cutting is, therefore, clear, *i.e.*, a lowering of prices in order to secure business in a highly competitive market. It does not appear to be contended that the price fixing provisions may be supported with the sole object of preventing such competitive price adjustments, but the finding appears to say that price fixing can be resorted to to prevent price cutting because such price cutting causes financial loss to coal pro-

ducers. One of the true purposes of the price provision is thus disclosed, *i.e.*, to better the financial condition of those engaged in coal production, not to regulate interstate commerce.

It is further found that price cutting also has caused "dislocations to and diversions of the normal flow of interstate commerce" (FF. 180, R. 210). As pointed out above (pp. 219-221), the prevention of shifts in interstate business is not a proper function of the Federal Government under the interstate commerce clause and nothing is added when it is said that such shifts occur by reason of lowering of prices in an active competitive market. There is no finding, ultimate or evidentiary, and no evidence, that price cutting has ever resulted in monopoly or in the destruction of competition in the bituminous coal industry, or that it has ever resulted in the shipment of less coal, in the scarcity of coal, or in the increasing of prices thereof to the consumer.

4. Unfair competitive practices.

The court found that price competition has occasioned unfair practices (FF. 181, R. 210). The practices referred to are those mentioned in Section 4, Part II(i) of the Statute (Appendix, pp. *18-21*, fols. 68-79).[9] It is ap-

[9]The only material on this subject in the record is a stipulation of counsel (R. 1177) to the effect that witnesses for the Government would testify if called that the practices listed in that section of the Statute "existed throughout the bituminous coal industry prior to 1933 and now exist (although not the general practice in that industry) * * * that they were in part caused by the competitive pressure in the bituminous coal industry, and that they have been a factor in the downward trend of prices", and that witnesses for the plaintiff would testify that "instances of the said practices occurred prior to 1933 but that they were not engaged in by the reputable firms in the industry and the said practices were not general."

parent that the forbidding of these practices was done for the purpose of enforcing the price regulations of this Code, not that the price regulations were enacted for the purpose of preventing these practices.

In respect of those of such practices which might properly be prohibited by the Federal Government when carried on in interstate commerce (*i.e.*, the prohibition of false advertising or unauthorized use of trade names, etc.) it is sufficient to say that it is apparent that price fixing is plainly inappropriate and unnecessary to the prevention of such practices. They may be prevented by direct prohibition to the extent that they occur in interstate commerce. There is no evidence, and no finding, that the Carter Coal Company has ever engaged in any such practices. If it must submit to Federal regulation of its *prices*, because some of those in the business may engage in such unfair methods of competition, then the Court will have approved the use of means so "inappropriate and unnecessary"[10] to prevention of unfair practices burdening interstate commerce, as to sanction price regulation of commodities in all businesses involving sales across State lines, for it is stipulated of record that Government witnesses would testify "that similar practices existed in other industries".[11]

Applying the rule which requires the Court to inquire into the real effect of any statute and to declare it invalid when without substantial relation to some evil within the power of the Government to suppress, the Court has, on more than one occasion, held that all-inclusive price fixing statutes, which apply alike to the innocent as well as to the

[10] *Linder* v. *U. S.*, 268 U. S. 5, 18.
[11] R. 1177.

guilty, cannot be regarded as reasonably adapted either to suppress fraud[12] or to prevent the destruction of competition and the establishment of monopoly.[13] "It is not permissible to enact a law which, in effect, spreads an all-inclusive net for the feet of everybody upon the chance that, while the innocent will surely be entangled in its meshes, some wrong-doers also may be caught."[14]

If the argument is that raising of prices will induce producers to deal honestly and fairly, it is at one with the argument advanced in the *Schechter* case in support of the wage regulations there involved, as tending to promote general prosperity and thus indirectly to promote interstate commerce (See discussions, p. 100 *et seq., ante*); and is even more remotely connected with a regulation of commerce than the pension system sought to be supported upon a like argument in *Retirement Board* v. *Alton R. Co.*[15] It is apparent that use of price fixing as a means for reforming these trade practices can in no just sense be regarded as a regulation of interstate commerce.

5. Raising of wages—Resulting prevention of shifts, strikes, price fluctuations, interruptions and stoppages of interstate commerce, insolvency of producers and waste of coal.

The remaining ultimate findings (FF. 182-185, R. 211-212) are all bottomed upon the view that price cutting leads to wage cutting, which would be stopped by price fixing. This discloses the other real purpose of the

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[12] *Tyson* v. *Banton*, 273 U. S. 418, 442, 443.

[13] *Fairmont Creamery Co.* v. *Minnesota*, 274 U. S. 1, 10.

[14] *Tyson* v. *Banton*, 273 U. S. 418, 442, 443. See *Adams* v. *Tanner*, 244 U. S. 590, 594; *Wolff* v. *Industrial Court*, 262 U. S. 522, 537; *Adkins* v. *Children's Hospital*, 261 U. S. 525.

[15] 295 U. S. 330, 367, 368.

price provisions, *i.e.*, the raising of wages of miners engaged in producing coal. Assuming that price fixing is a means reasonably adapted to that object, any suggestion that the accomplishment of that object is an end for which the commerce power was given to the Congress plainly will not bear serious discussion.

The findings, however, do not stop there, but suggest that the object of the price regulation is not wage increase *per se*, but the removal of burdens and obstructions upon interstate commerce which are caused by wage cutting.

The first of these suggestions is (FF. 182, R. 211) that wage cutting results in price cutting, which in turn has shifted, diverted and dislocated the normal flow of interstate commerce, and given producers who cut wages an undue competitive advantage in that commerce.[1] This is but another way of saying that price differentials between producing States, areas and mines in a highly competitive market govern the distribution of business as between producers. The argument that the commerce clause confers upon the Federal Government the power to allocate the amount of business to be enjoyed by the several producing States, respectively, has already been treated heretofore herein.

The other theory suggested by the findings (FF. 184-185, R. 211-212) as to the remaining end to the accomplishment of which price fixing is sought to be used as a means, is based upon the following chain of relationships:

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[1] "Such disparities in wage rates have permitted disparities in price which have in turn directly shifted, diverted and dislocated the normal flow of bituminous coal in interstate commerce to such an extent as to substantially burden, obstruct and restrain the same and to give to producers employing such competitive methods an undue advantage in interstate commerce over producers of bituminous coal not employing the same." (R. 211)

(1) that the fixing of prices will prevent wage cutting; (2) that the prevention of wage cutting will prevent strikes; and (3) that the prevention of strikes will prevent burdens upon interstate commerce resulting from strikes, *i.e.*, (a) price fluctuations, (b) interruptions and obstructions of interstate commerce in bituminous coal, (c) dislocations and diversions of the normal flow of interstate commerce in coal, (d) insolvency of coal producers, and (e) waste of coal resources.

If, contrary to plain fact, we assume that the prevention of these ultimate consequences is the real object and purpose of the price fixing provisions, this does not help the Government's case. The object of preventing insolvency of coal producers must be put aside as not an end for which the commerce power was granted. So too must the object of preventing waste of coal resources, for the prevention of waste of natural resources is a function of the State governments and not of the national government.[2]

With respect to the prevention of price fluctuations, interruptions and stoppages, and dislocations and diversions, resulting from strikes, it will be observed that before we can consider them we must first make the assumption that the prevention of these burdens upon interstate commerce rather than the raising of miners' wages is the end of the price fixing provisions; and we must then make the further assumption that there were proper reasons making it "necessary and proper" to use this tortuous means for prevent-

[2] *Ohio Oil Co.* v. *Indiana*, 177 U. S. 190; *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61; *Walls* v. *Midland Carbon Co.*, 254 U. S. 300, 324; *Bandini Petroleum Co.* v. *Superior Court*, 284 U. S. 8; *Champlin Refining Co.* v. *Corporation Commission*, 286 U. S. 210, 233, 234.

ing those burdens instead of the simple means of regulating them directly. Having made these assumptions, we would still be faced with the problem whether the attaining of these objects is an end within the scope of the commerce power.

It will be observed that the finding relates only to such of these as have been caused by strikes. (FF. 184, R. 211-212.) No doubt strikes may cause some or all of these results. (*Coronado Coal Co.* v. *United Mine Workers,* 268 U. S. 295.) But the shutting down of a productive industry within a State for any valid reason, such as lack of financial resources, would likewise produce the same effects upon interstate commerce. In order to preserve, on the one hand, the hegemony of the Federal Government in respect of interstate commerce and its necessary authority to prevent intended obstructions of that commerce, and to preserve, on the other hand, local rights and authority in respect of production, it has become thoroughly settled that the power of the Congress under the necessary and proper clause[3] to protect interstate commerce by the removal of burdens and restraints thereto is limited to the removal of *direct* burdens and restraints and not those which are merely indirect and remote, no matter how substantial.[4]

The Congress has already, in a previous statute aimed directly at the prevention of the burdening and obstructing of interstate commerce through strikes in productive industry, exercised "all the power it possessed" to that end (*Atlantic Cleaners & Dyers* v. *U. S.,* 286 U. S. 427, 435), and in *United Leather Workers* v. *Herkert,* 265 U. S. 457, 471, the Court pointed out, after reviewing the decisions under

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[3] *Ruppert* v. *Caffey,* 251 U. S. 299-300; *American Express Co.* v. *Caldwell,* 244 U. S. 617.

[4] *Schechter Corp.* v. *U. S.,* 295 U. S. 495, 546.

that statute and under other regulations of interstate commerce:

> "This review of the cases makes it clear that the mere reduction in the supply of an article to be shipped in interstate commerce, by the illegal or tortious prevention of its manufacture, is ordinarily an indirect and remote obstruction to that commerce. It is only when the intent or necessary effect upon such commerce in the article is to enable those preventing the manufacturer to monopolize the supply, control its price or discriminate as between its would-be purchasers, that the unlawful interference with its manufacture can be said directly to burden interstate commerce."

In cases relating to strikes in this very industry the Court has pointed out that some such strikes upon proper proof may be regarded as resulting in direct burdens upon interstate commerce (*Coronado Coal Co.* v. *United Mine Workers,* 268 U. S. 295, 310), while others may not (*United Leather Workers* v. *Herkert,* 265 U. S. 457; *United Mine Workers* v. *Coronado Coal Co.,* 259 U. S. 344).

The Court has also pointed out that the observance of the "necessary and well-established distinction between direct and indirect effects" is a *constitutional* and not a merely *statutory* requirement (*Schechter Corp.* v. *U. S.,* (295 U. S. at 548); that a view of the scope of the commerce clause which would permit the Federal Government to regulate matters having only "an indirect effect upon interstate commerce" would be to construe it so broadly as to make it reach "all enterprises and transactions" "practically all of the activities of the people", and the necessary effect of this would be that the "authority of the State over its domestic concerns would exist only by

sufferance of the Federal Government", and "even the development of the State's *commercial facilities* would be subject to Federal control" (*Id.* at p. 546).

If, therefore, a statute directly aimed at prohibiting obstructions of interstate commerce through strikes in productive activity can constitutionally be applied only discriminately and in respect of those strikes that result in something more than "the mere reduction of the supply of an article to be shipped in interstate commerce" (*Herkert* case, *supra*), how is it possible to support a general regulation of the prices of all coal producers in the hope thereby of avoiding strikes and their resulting effects, direct and indirect, upon interstate commerce? How is it possible, consistently with the constitutional requirement of direct effect, to apply such a price regulation on such a theory to a Company in respect of which the findings show that it has had only two strikes in twenty-four years, one lasting two days and the other two weeks, without any finding or evidence that those strikes caused any direct burden upon interstate commerce or even any substantial burden upon it? (FF. 32, R. 124-125.)

6. The purpose of the price fixing provisions is not the regulation of commerce, but increase of the wage of the miner and the return to the coal operator.

The tortured reasoning necessary in order to establish any connection between the price regulations and the removal of the so-called "burdens and obstructions" to interstate commerce confirms the conclusion as to the real purpose and object of this statute as pointed out in Point II, *ante*.

Most of the specific ends which the findings themselves say the price provisions were intended to accomplish are clearly not within the Federal authority under any clause of the Constitution; and, in respect of ends which under some circumstances it may be within the Federal power to accomplish, the utter lack of the necessity and propriety of price regulation for the accomplishment of those ends is apparent.

Adding this to consideration of the title of the Act and its terms;[1] of the Committee reports in respect of it, both majority and minority;[2] of its wide coverage of the whole of the bituminous coal industry,—irrespective of any connection of particular shipments, particular producers or particular mines with interstate commerce;[3] the conclusion is inescapable that the purpose is regulation of the wage of the miner and of the amount of business and return to the coal producer, attempted to be accomplished under the pretext of an exertion of the commerce power.

7. This case is completely lacking in the factual foundation necessary to support the price fixing provisions as a regulation of interstate commerce, even assuming Congress may exercise such power in any case.

Unless the power is absolute it must rest upon some factual foundation bringing its exercise within the Federal sphere. Neither inadequacy of wages or profits in a given industry is sufficient for this purpose. Otherwise the power of Congress to determine what are adequate wages

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[1]See pp. 81-85 *et seq., ante.*
[2]See pp. 85-86, *ante.*
[3]See p. 87 *et seq., ante.*

and what are adequate profits would be plenary and could be exercised in respect of all industries. Clearly also the price fixing power, if it exists at all, may not be exercised for the purpose of promoting social security or for the correction of social evils within the States. If the power exists at all, it may be exercised only for the purpose of removing burdens or restraints upon interstate commerce or obstructions thereto.

As pointed out above (p. 104 *et seq., ante*), whether such burdens, restraints or obstructions exist, within a constitutional sense, is primarily a question of law for which, however, there must be a factual foundation. Neither a declaration by Congress to that effect, nor an ultimate finding of fact by a trial court, is or can be conclusive as to the existence or non-existence of the necessary factual foundation. In this case, as appears both from the evidentiary findings and from the evidence itself, the necessary factual foundation is wholly lacking. Both the evidence and the evidentiary findings disclose complete absence of "burdens", "restrictions" or "obstructions" (see pp. 103-112, *ante*). The Act, so far from having for its purpose the removal of any such, has the contrary purpose viz., the imposition by Congress of an artificial restraint upon the free movement of articles in interstate commerce for the promotion of the economic well being of those engaged in the industry, or some of them.

POINT VII

SINCE THE STATUTORY SCHEME IS MADE APPLICABLE TO ALL BITUMINOUS COAL PRODUCERS AND IN RESPECT OF ALL BITUMINOUS COAL PRODUCED, IT IS INVALID IN ITS ENTIRETY.

As previously pointed out, the regulatory provisions of the Code and the compulsory "tax" are expressly made applicable by the statute to all bituminous coal producers and in respect of all bituminous coal produced. To the extent that the statute is thus made applicable to wholly intrastate activities within the bituminous coal industry (shown by this record to constitute at least 42% of all bituminous coal sales) it is clearly outside the commerce power. As pointed out in *Trade-Mark Cases,* 100 U. S. 82, 96-97 relating to a statute punishing *all* fraudulent use of registered trade-marks, although the power of the Congress in that regard extended only to trade-marks used in interstate or foreign commerce:

> "When, therefore, Congress undertakes to enact a law, which can only be valid as a regulation of commerce, it is reasonable to expect to find on the face of the law, or from its essential nature, that it is a regulation of commerce with foreign nations, or among the several States, or with the Indian tribes. If not so limited, it is in excess of the power of Congress. If its main purpose be to establish a regulation applicable to all trade, to commerce at all points, especially if it be apparent that it is designed to govern the commerce wholly between citizens of the same State, it is obviously the exercise of a power not confided to Congress."

Similarly, a liability act made applicable "to *all* common carriers engaged in interstate commerce * * * without quali-

fication or restriction as to the business in which the carriers or their employés may be engaged at the time of the injury, of necessity includes subjects wholly outside of the power of Congress to regulate commerce", and is *pro tanto* unconstitutional.[1]

Again, a Federal statute attempting to regulate transactions not constituting interstate commerce and not imposing a direct obstruction upon such commerce is to that extent invalid.[2]

This being so, it becomes necessary to inquire whether the statute is invalid as an entirety because of its coverage, and without regard to the question whether a different statute limited to producers selling across State lines and to production that moves across State lines would be within the power of the Congress. The applicable general rule is that when the Congress enacts a statute which is comprehensive and nation-wide in its coverage, and thereby exceeds its constitutional authority, the Court will not assume to remake the law so as to be only partial in its coverage, but it will hold that the statute is invalid in its entirety. This rule has been applied consistently.[3] In applying it to hold the whole statute invalid in the *Trade-Mark Cases*, *supra*, the Court said:

> "If we should, in the case before us, undertake to make by judicial construction a law which Congress

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[1] *Howard* v. *Illinois Central R. Co.*, 207 U. S. 463, 498.

[2] *Hill* v. *Wallace*, 259 U. S. 44, 68.

[3] *Trade-Mark Cases*, 100 U. S. 82, 99; *Howard* v. *Illinois Central R. Co.*, 207 U. S. 463, 502, 504; *Butts* v. *Merchants Transportation Co.*, 230 U. S. 126, 133-138; *United States* v. *Reese*, 92 U. S. 214; *United States* v. *Harris*, 106 U. S. 629, 641; *Baldwin* v. *Franks*, 120 U. S. 678, 685; *James* v. *Bowman*, 190 U. S. 127, 140; *United States* v. *Ju Toy*, 198 U. S. 253, 262; *Illinois Central R. R. Co.* v. *McKendree*, 203 U. S. 514, 529, 530.

> did not make, it is quite probable we should do what, if the matter were now before that body, it would be unwilling to do; namely, make a trade-mark law which is only partial in its operation, and which would complicate the rights which parties would hold, in some instances under the act of Congress, and in others under State law. Cooley, Const. Lim. 178, 179; *Commonwealth* v. *Hitchings,* 5 Gray (Mass.), 482" (p. 99).

Upon precisely the same ground the whole statute in *Howard* v. *Illinois Central R. Co., supra,* was held invalid because of its too broad coverage. Applying the same general rule in *Butts* v. *Merchants Transportation Co.,*[4] the Court refused to apply to territories within the exclusive jurisdiction of the United States a statute which had been enacted to be applicable within the States as well, in that it was unconstitutional in the latter aspect. In holding the statute inseparable, the Court inquired:

> "But how can the manifest purpose to establish an uniform law for the entire jurisdiction of the United States be converted into a purpose to create a law for only a small fraction of that jurisdiction?" (p. 133).

The separability clause in the instant statute does not destroy this general rule. As shown in Point IV *ante,* the separability clause of this statute is the standard clause, and it is thoroughly settled that that has only a limited effect and operates merely to reverse the usual presumption that any invalid provision of any character makes the whole statute bad. See *Williams* v. *Standard Oil Co.,* 278 U. S. 235, 241, 242. In *Hill* v. *Wallace, supra,* as already noted, the statute purported to regulate all the specified activities

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[4]230 U. S. 126, 133 *et seq.*

of the board of trade whether constituting or directly obstructing interstate commerce or not, and, although that statute contained a separability clause in the same language as that in the instant statute, the Court held the whole of the regulatory provisions bad, stating that the separability clause "did not intend the Court to dissect an unconstitutional measure and reframe a valid one out of it by inserting limitations it does not contain. This is legislative work beyond the power and function of the court" (p. 70).

That the present statute cannot stand if limited to sales of bituminous coal across State lines is clear. Both the taxing section and the regulatory sections disclose a purpose to govern all sales. The court below has concluded that prices of coal sold in interstate commerce are "inextricably intermingled with interstate prices" (R. 214), and the parties have stipulated that the competitive situation is such that price regulation in respect of sales across State lines would be unfair unless wholly intrastate sales were also subjected to such Federal price regulation (R. 376). What the parties and the court below have really said, we submit, is that unless the Congress be permitted (and it cannot constitutionally be permitted) to fix the price of all wholly intrastate sales of bituminous coal, it cannot fairly, and will not, regulate the price at which such coal is sold across State lines, even assuming that it has the power to do so (which we deny).

Whatever conclusion may be reached as to the separability of the various *sections* of the Code (and we believe them to be inseparable) we submit that, in respect of the *coverage,* the statute was intended to be applicable to all coal producers and to all coal produced, or to no coal producers and to no coal produced. It cannot constitutionally be applicable to all. It must fall in its entirety.

POINT VIII

THE MINIMUM PRICE FIXING PROVISIONS OF THE STATUTE AND CODE ARE VOID BECAUSE INDEFINITE AND ARBITRARY AND BECAUSE CONSTITUTING AN UNLAWFUL DELEGATION OF LEGISLATIVE AUTHORITY.

Examined in the light of familiar rules (*Panama Refining Co.* v. *Ryan*, 293 U. S. 388; *Schechter Corp.* v. *United States*, 295 U. S. 495), the minimum price fixing formula of the Guffey Act clearly includes unlawful delegation of legislative authority, constituting it a grant of arbitrary power of indefinite scope, unlimited by any ascertainable standard.

The basis of the scheme[1] is two-fold: *first*, the establishment of minimum prices locally, within each of the various districts (of which there are 23); and, *second*, the coordination of all the local prices on a nation-wide basis. Looking at these two major steps in turn, and then considering the formula as a whole, it appears:

1. Local price establishment — arbitrary and unlimited power of "classification."

Within each district there will be set up a district board, to be composed of not less than 3 nor more than 17 members, all but one of whom shall be elected by produc-

[1]The provisions in question are Act, Sec. 4, Part II (a) and (b), Appendix, pp. *10-16*, fols. 35-57; Code, Part II, Secs. 4-5, R. 61-65. An outline of them will be found in the synopsis of the statute *ante* at pp. 14-18.

ers, the one exception being designated by the mine workers' union (Appendix, pp. *7-8,* fols. *24-27*). It is this district board which initially "establishes" the minimum prices for the producers within the district.

The first step in the process is the determination of the weighted average of total costs of ascertainable tonnage produced within each district in 1934, and, on the basis of this, the weighted average of total costs for each minimum price area (of which there are 9).

The next step, chronologically, will be the "classification" by each district of "coals and price variations as to mines and consuming market areas as it [the district board] *may deem necessary and proper"* (Appendix, p. *11,* fols. *37-38*). No definition of "classification", of "price variation" or of "consuming market areas" is given; nor is any standard prescribed other than *"as it may deem necessary and proper"*. The importance of this cannot be over-emphasized, since the classification of a producer's various kinds, qualities and sizes of coal in any practicable price-fixing system will of necessity be the determining factor as to the price to be allotted, and price in turn may make or ruin a mine financially (FF. 47, R. 132; FF. 155, R. 201). Hence the complete lack of criterion for "classification" at the outset of the price formula is in itself sufficient to invalidate the entire scheme. But there are further grounds.

The next step in the process is the establishment by the district board of minimum prices f.o.b. mine "for kinds, qualities, and sizes of coal" produced in the district (Appendix, p. *11,* fol. *37*). What is meant by "kinds, qualities, and sizes" is not explained further, but presumably this

is the result of "classification" upon such basis as the board "may deem necessary and proper". Such prices are to be established "so as to yield" (presumably in the aggregate) "a return per net ton for each district in a minimum price area * * * equal as nearly as may be to the weighted average" of total costs in the minimum price area (Appendix, p. *11,* fols. 38-39). How the various prices shall be apportioned mine by mine and size by size is left completely to the discretion of each board, except that the prices "shall reflect, as nearly as possible, the relative market values of the various kinds, qualities and sizes of coal, shall be just and equitable as between producers within the district, and shall have due regard to the interests of the consuming public" (Appendix, p. *12,* fols. 43-44). The statute is completely silent, however, as to the date as of which "relative market values" shall be determined. The record is replete with evidence of how this factor varies from time to time—FF. 36, R. 127; FF. 56, R. 136; FF. 73, R. 145; FF. 96, R. 161; FF. 119-123a, R. 179-183; FF. 126, R. 185. With this background of fact, how can the Congressional silence as to the date as of which relative market values shall be determined be construed as other than an abdication of legislative function?

The final step in this preliminary local price establishment is the submission by each district board to the Commission of its price schedule, to be approved, disapproved or modified (Appendix, pp. *12-13,* fols. 44-46). The Commission is limited by the mandate "That all minimum prices established * * * shall be just and equitable as between producers within the district" (Appendix, p. *13,* fol. 45). But as of when? Here again the Act is silent.

2. Coordination.

Prices having been "established" in all districts they are then to be coordinated "in common consuming market areas upon a fair competitive basis", taking into account "*among other factors, but without limitation,* * * * the various kinds, qualities, and sizes of coal, and transportation charges upon coal" (Appendix, p. *14,* fol. 51). What are the "other factors"? That, clearly, is a matter for the *discretion* of the price-fixing agencies, except only that prices are to be "just and equitable, and not unduly prejudicial or preferential, as between and among districts, and shall reflect, as nearly as possible, the relative market values * * *: to the end of affording the producers in the several districts substantially the same opportunity to dispose of their coals *upon a competitive basis as has heretofore existed*" (Appendix, pp. *14-15,* fols. 52-53).

Here again there is a complete silence as to the period meant by "heretofore". Shall it be the period 1923-1933, when, Government witnesses complained, the Southern mines took large pieces of business from the Northern, in the stress of unrestrained competitive warfare? (FF. 119, R. 179-180). The Southern producers would like that. Or shall it be the NRA period when free competition was restrained by imposition of a Federal code which fixed prices, and the Northern mines recovered their markets from the Southern mines? (R. 1069, 1070). That would please the Northern mines.

It seems clear that a choice of such magnitude, having such significance to individual operators in various sections of the Nation, can be made, if it can validly be made at all, only by the Congress. Being delegated, as it has

been in this Act, to an administrative agency or agencies, the power to make the choice cannot be validly exercised.

It is further provided, however, that should the Commission find, either on petition of any district board or party in interest, *or on its own motion,* that "the foregoing method of fixing minimum prices under subsection (a) is prejudicial to any district" and "that the prejudice cannot be removed through the coordination of minimum prices as provided for in this subsection (b) then the Commission may establish *a different basis* for determining minimum prices in such district, to the end that fair and competitive prices shall prevail in the marketing of the coal produced in such district" (Appendix, pp. *15-16,* fol. 56). In this respect the Commission is without *any standard whatsoever* except that the prices established shall yield a return, per net ton, not less than weighted average cost of the district. In other words, the Commission at any time, *on its own motion,* as to any district or districts may disregard the whole price-fixing formula set up in the Act and *establish one of its own choosing.*

3. The provisions are void for lack of standard, and because delegating arbitrary and indefinite power.

Viewed as a whole, the process just reviewed is clearly so vague and indefinite as to be void on that account alone. Especially in respect of the key provisions respecting classification and coordination is the lack of any guiding standard apparent. Manifestly the whole price-fixing scheme is to be administered with the "discretion" of the price-fixing agencies as the sole ultimate standard. It may be said that this is true of every case where power is conferred upon an

administrative body, but it is familiar law that administrative discretion to be wholesome must not be arbitrary, and whether or not it is arbitrary is judged in the light of its relation to the standard established by the statute. We know of no statute in which administrative agencies have validly been vested with such power to take such action as they "may deem necessary and proper", as is involved in the power conferred by this statute to make classifications of coals and price variations mine by mine such as in their judgment may produce a result manifestly unascertainable in advance.

No producer is interested in "the weighted average of the total costs, per net ton" either in the district or minimum price area in which he is located. He is interested solely in the price at which he may sell in consuming market areas the several classes of coal which he mines. His ability to sell in competition with others depends upon the classification placed upon his coal and the relation, in common consuming markets, between the price fixed therefor at his mine as compared with that of competitors either in the same, but more particularly in other, districts. The classification of his coal is as important to him as the price itself, because the price is to be varied according to such classification. Classification constitutes the first step in the fixing of minimum prices. There were recognized under the NRA over 27,000 sizes, varieties and prices of coal in Minimum Price Area No. 1, and there are possibly 40,000 in the entire United States (R. 266, 268). No standard whatever is prescribed for the making of this classification. It rests solely within the uncontrolled discretion of the district board, subject perhaps (although as to classification it is not plain) to review by the Commission.

The respective district-boards having classified coal at each mine in such manner as they "deem necessary and proper", and the weighted average cost for each minimum price area and for each district therein having been ascertained, the prices are then to be coordinated by districts for the purpose "of affording the producers in the several districts substantially the same opportunity to dispose of their coals upon a competitive basis as has heretofore existed". This is the only standard prescribed for such coordination. The statute does not provide as of what period such heretofore existing "opportunity" shall be determined, whether as of the date of the passage of the Act, the NRA period or as of any other date.

The determination of the period is thus left to the price-fixing agencies. Yet upon the period chosen and upon the manner in which coordination provisions are administered depends the ability of each mine to sell upon a competitive basis in consuming areas in which it meets the competition of other mines and other districts. Since out of the coordinated prices so fixed mine by mine the weighted average cost for each minimum price area is sought to be realized and since there are wide variations in individual costs among mines and districts, it is evident that the coordinated minimum prices fixed for the several mines must in some instances be higher and in other instances lower than the respective costs of production at such mines. Otherwise the weighted average required by the statute to be maintained could not be maintained. The coordinated price at each mine, therefore, for sale of coal in competing markets, rests in the last analysis in the uncontrolled discretion of the price-fixing agencies. The fact that a producer dissatisfied with his coordinated price may have the same

reviewed by the Commission does not alter the fact that no standard for its determination is prescribed, either as to the period as to which the "opportunity" sought to be preserved is to be determined, as to the manner in which the coordinated price at each mine is to be fixed, or as to the bases upon which the "classification" is to be made, upon which the coordinated price is to be based.

Until recently, no such arbitrary and unrestrained power over the essential activities of any class of persons has ever been conferred upon any administrative body in this country; and no such power has ever validly been so conferred. See *Panama Refining Co.* v. *Ryan* and *Schechter Corp.* v. *U. S., supra.* Congress doubtless realized that the power intended to be conferred was so broad that it could not prescribe a standard for its exercise. But this is no justification either for delegation of legislative authority or for placing within the hands of price-fixing agencies (composed for the most part of producers engaged in competition with all the other producers in the district represented by them) power to determine without guide, other than the exercise of their own judgment, *first,* the classification of coals produced at each mine, and, *second,* the price at which they shall be sold.

The price-fixing provisions of the statute are clearly void as a delegation of legislative power and because arbitrary and indefinite.

POINT IX.

THE STATUTE AND THE CODE ARE REPUGNANT TO THE FIFTH AMENDMENT.

1. The statute and code destroy all the fundamental rights of economic freedom heretofore regarded as protected by the Fifth Amendment.

It is familiar history that the adoption of the first ten amendments to the Federal Constitution was in effect a condition to the ratification of that instrument. Chief Justice Marshall tells us in *Barron* v. *Baltimore,*[1] a case involving the Fifth Amendment, that "it is a part of the history of the day" that the Constitution was not effected "without immense opposition"; that "serious fears were extensively entertained" that the powers of the Federal Government "might be exercised in a manner dangerous to liberty". "In almost every convention by which the Constitution was adopted", he adds, "amendments to guard against the abuse of power were recommended. These amendments demanded security against the apprehended encroachments of the general government * * *."[2]

The liberty thus safeguarded by the Fifth Amendment against Federal encroachment, and subsequently against State encroachment by the Fourteenth Amendment, is not confined to mere liberty of the person, but was intended also to guard the *economic liberty* of the citizen against Government encroachment, to secure to him the right to

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[1]7 Pet. 243, 250.
[2]Id.

earn a livelihood where he will and in the occupation of his choice, and to contract about his own affairs, whether as employer or employee.[3]

As stated in the *Allgeyer* case:

> "The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purposes above mentioned" (p. 589).

In considering the constitutional validity of the statute at bar, some effect, at least, must be given to this express guaranty against encroachment by Government upon the economic liberty of the citizen.

While the economic liberty thus guaranteed is not absolute,[4] "freedom of contract is, nevertheless, the general rule and restraint the exception."[5] A few basic rights, the heritage of all free men in a free society, whether employers or employees, have been regarded as indispensable require-

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[3] *Allgeyer* v. *Louisiana,* 165 U. S. 578, 589; *Adkins* v. *Children's Hospital,* 261 U. S. 525, 545; *New York Life Insurance Co.* v. *Dodge,* 246 U. S. 357, 373, 374; *Coppage* v. *Kansas,* 236 U. S. 1, 10; *Adair* v. *United States,* 208 U. S. 161, 174, 175.

[4] *Adkins* v. *Children's Hospital,* 261 U. S. 525, 546; *Near* v. *Minnesota,* 283 U. S. 697, 707-708.

[5] *Adkins* v. *Children's Hospital, supra.*

ments of the economic liberty guaranteed by the Constitution, as follows:

(a) The right of employers and employees, respectively, to determine the wages which they shall pay or for which they shall work.[6] The statute and Code here involved destroy this right and require that employers and employees alike accept wages determined by others, or give up their business and employment altogether.

(b) The right of the owner to fix the price at which his property shall be sold or used.[7] This right the present statute completely abrogates.

(c) The right of the workman to choose his employer, and of the employer to choose his employees,[8] and the right of the business man to choose his customers and business associates.[9] The provisions of the instant statute for collective bargaining[10] and majority rule[11] completely destroy the correlative rights of employees to choose their own employers and of employers to choose their own employees; and the control of markets exercised under the price fixing provisions seriously restricts, if it does not wholly destroy, the right of the operator to select his own customers.

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[6]*Adkins* v. *Children's Hospital*, 261 U. S. 525; *Wolff* v. *Industrial Court*, 262 U. S. 522.

[7]*Tyson* v. *Banton*, 273 U. S. 418; *Ribnik* v. *McBride*, 277 U. S. 350; *Williams* v. *Standard Oil Co.*, 278 U. S. 235.

[8]*Adair* v. *U. S.*, 208 U. S. 161; *Coppage* v. *Kansas*, 236 U. S. 1.

[9]*Grenada Lumber Co.* v. *Mississippi*, 217 U. S. 433; *Federal Trade Commission* v. *Raymond Co.*, 263 U. S. 565; *United States* v. *Colgate & Co.*, 250 U. S. 300.

[10]Sec. 4, Part III (a), (b) and (e); Appendix, pp. *22-24*, fols. 81-83, 88-89.

[11]Sec. 4, Part III (g); Appendix, p. *24*, fols. 91-93.

(d) The right of every citizen to determine for himself what trade or business he will engage in.[12] While the instant statute does not by express provision deny this right, it does so in effect by means of the control of production and employment by the price and wage fixing powers assumed, as heretofore pointed out.

While statutes restrictive of one or another of these fundamental rights of economic liberty have been sustained for limited periods and under special circumstances in a few instances,[13] these cases have generally been regarded as going to the "borderline" of the law.[14]

By the *instant* statute, for the first time in our history, there is an attempt to destroy each and all of these fundamental economic liberties of the people at one fell swoop. How can that statute be sustained consistently with giving *any* effect to the guaranty of the Fifth Amendment that the economic liberty of the people shall be secure from "encroachments of the general government"?[15]

Upon this point, as upon other points, it is no answer to suggest that economic conditions have changed since this guaranty was written, and to urge that the inequality of bargaining power of employer and employee now justifies the ending of individual liberty in respect of the most vital elements of the business of earning a livelihood. Opinions may well differ as to the extent or existence of this sup-

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[12] *New State Ice Co.* v. *Liebmann*, 285 U. S. 262.

[13] *Wilson* v. *New*, 243 U. S. 332; *Nebbia* v. *New York*, 291 U. S 502; *cf. T. & N. O. R. Co.* v. *Railway Clerks*, 281 U. S. 548.

[14] *Wolff* v. *Industrial Court*, 262 U. S. 522, 544; *Retirement Board* v. *Alton R. Co.*, 295 U. S. 330, 369.

[15] See *Barron* v. *Baltimore*, *supra*.

posed inequality of bargaining power. But, if it exists, it cannot justify the restraint of *all* the fundamentals of economic liberty as this statute attempts to do. The wide and all-inclusive coverage of this statute from the standpoint of the restraints it imposes upon the economic liberty of the citizen, is another proof, if any were needed, of the fact that this is a statute providing for a "planned economy" in industry, by which is meant the regimentation of all individual effort and the control of all important economic and business matters by an omnipotent central government. Assume that such regimentation may work, and work justly, under an upright and honorable Administration, but how would it work under a corrupt one?

The dilemma is no new one. An absolute government, when justly and wisely administered, may be the most economically efficient, but the tyranny of absolute government in respect of the economic lives as well as the freedom of person of the people has an ancient and infamous history which was well-known to the framers of the Constitution.[16]

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[16]The debates in the Constitutional Convention indicate that it was not the intention that the power given the Federal Government to regulate trade should include the power to grant monopoly of trade (II Farrand 615-616). The guaranty of the individual economic liberty of the citizen in the Fifth Amendment removes any doubt on the subject. Many restraints had in the past been placed by absolute governments upon the right of individuals to earn a livelihood, and the framers of the Constitution were familiar with these. An illustration is found in the *Case of Monopolies,* Trin. 44, Eliz., 11 Co. Rep. 84b (77 Eng. Rep. 1260). In that case the Queen "intending that her subjects being able men to exercise husbandry, should apply themselves thereunto and that they should not employ themselves in making playing cards", granted a monopoly in the whole trade traffic and merchandise of all playing cards to one, Bowes. The Attorney General defended the grant upon the ground *inter alia* that playing cards are "the occasion of loss of time, and decrease of the substance of many, the loss of the service and work of servants, causes of want, which is the mother of woe and destruction, and therefore it belongs to the Queen (who is *parens patriae, et pater familias totius regni,* and as it is said in 20 H. 7, fol. 4 *Capitalis Justiciarius*

Knowing the alternatives, the choice was made for economic freedom, and the guaranty of it was written into the Fifth Amendment. Grant that that freedom is far from complete, yet *here* is a statute which divests the citizen of *each and all* of the basic rights of economic freedom which have been regarded as indispensable to the preservation of our free society during all of the years of its existence. Such a statute cannot be sustained without the destruction of the fundamental principles upon which our system of government is based.

Angliae) to take away the great abuse, and to take order for the moderate and convenient use of them." The Chief Justice and the full court, however, ruled that the grant was a monopoly and utterly void as against the common law. It was pointed out that it was not the purpose of the grant to prevent the playing of cards as an evil, but to grant a monopoly of the business and labor of making and selling the cards themselves; that the purpose of the act was "not to maintain and increase the labours of the poor card makers within the realm" "but to utterly take away and destroy their labours."

The opinion refers to the earlier case of *Davenant and Hurdis*, Trin. 41 Eliz. Rot. 92, where a rule of the Merchant Taylors of London, requiring members to have at least half of their cloth dressed by cloth workers who were members of the company, was held void as against the common law because "against the liberty of the subject" "for every subject, by the law, has freedom and liberty to put his cloth to be dressed by what clothworker he pleases, and cannot be restrained to certain persons, for that in effect would be a monopoly". To the suggestion that "provisions and cautions" might be added to abate the danger of monopolies, the Court answered "it is mere folly to think that there is any measure in mischief or wickedness". There were said to be "three inseparable incidents to every monopoly against the Commonwealth", (1) "the price of the same commodity will be raised, for he who has the sole selling of any commodity, may and will make the price as he pleases"; (2) "After the monopoly is granted, the commodity is not so good and merchantable as it was before: for the patentee having the sole trade," regards only his private benefit, and not the Commonwealth; and (3) That it "tends to the impoverishment of divers artificers and others, who before, by the labour of their hands in their art or trade, had maintained themselves and their families, who now will of necessity be constrained to live in idleness and beggary" and that "every man's trade maintains his life, and therefore he ought not to be deprived or dispossessed of it, no more than of his life."

2. The Fifth Amendment requires that statutes enacted under the commerce power shall have a real and substantial relation to the regulation of interstate commerce, and that they shall not be arbitrary, capricious or confiscatory.

It is thoroughly established that the Fifth Amendment requires that statutes enacted under the commerce power, as under other powers, shall not be unreasonable, arbitrary, capricious or confiscatory and that they shall have a real and substantial relation to the accomplishment of the objects of the granted power.[1] The Fourteenth Amendment places the same limitations upon State statutes, enacted under the reserved powers of the States.[2]

These constitutional requirements of due process are applicable "in the execution of any power, no matter what it is, [of] Government, Federal or state" (*Chicago B. & Q. Ry. Co.* v. *Drainage Commrs.*, 200 U. S. 561, 593). They apply "in every case of the exercise of governmental power" (*id.*). As pointed out in the case just cited:

> "If the means employed have no real, substantial relation to public objects which government may legally accomplish; if they are arbitrary and unreasonable, beyond the necessities of the case, the

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[1] *Adair* v. *U. S.*, 208 U. S. 161, 178; *Blodgett* v. *Holden*, 275 U. S. 142, 147; *Chicago, R. I. & P. Ry.* v. *U. S.*, 284 U. S. 80, 97; *Monongahela Navigation Co.* v. *U. S.*, 148 U. S. 312, 336; *Untermyer* v. *Anderson*, 276 U. S. 440, 445; *U. S.* v. *C. M. St. P. & P. R. Co.*, 282 U. S. 311, 327; *Heiner* v. *Donnan*, 285 U. S. 312, 330; *Interstate Commerce Comm.* v. *Oregon-Wash. R. & N. Co.*, 288 U. S. 14, 39.

[2] *Triegle* v. *Acme Homestead Association* (decided February 3, 1936); *Nebbia* v. *New York*, 291 U. S. 502, 525; *C. B. & Q.* v. *Drainage Commrs.*, 200 U. S. 561, 593; *Railroad Commission Cases*, 116 U. S. 307, 331; *Reagan* v. *Farmer's Loan & Trust Co.*, 154 U. S. 362, 398.

> judiciary will disregard mere forms and interfere for the protection of rights injuriously affected by such illegal action. The authority of the courts to interfere in such cases is beyond all doubt. *Minnesota* v. *Barber,* 136 U. S. 313, 320. Upon the general subject there is no real conflict among the adjudged cases."

These principles have had frequent restatement. In *Adair* v. *United States,* 208 U. S. 161, 178, the Court said:

> "Manifestly any rule prescribed for the conduct of interstate commerce, in order to be within the competency of Congress under its power to regulate commerce among the States, must have some real or substantial relation to or connection with the commerce regulated."

In *Nebbia* v. *New York,* 291 U. S. 502, 525, it was reiterated that the guaranty of due process contained in both the Fifth and the Fourteenth Amendments requires:

> "that the law shall not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained."

In *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312, 336, the Court pointed out that

> "But like the other powers granted to Congress by the Constitution, the power to regulate commerce is subject to all the limitations imposed by such instrument, and among them is that of the Fifth Amendment, * * *"

These requirements have had pertinent application in railroad cases, those involving Federal regulation of them

as instrumentalities of interstate commerce, as well as those involving their regulation by the States as common carriers in intrastate commerce. Such regulations, either Federal or State, must have a real and substantial relation to the accomplishment of a power of the Government, and must not be arbitrary and capricious. *Retirement Board* v. *Alton R. Co.,* 295 U. S. 330, 347, 348. And, in such cases, the power to regulate may not be exercised to confiscate or to destroy. "This power to regulate", the Court has pointed out, "is not a power to destroy, and limitation is not the equivalent of confiscation." (*Railroad Commission Cases,* 116 U. S. 307, 331; *Reagan* v. *Farmers Loan & Trust Co.,* 154 U. S. 362, 398); and again "broad as is the power of regulation, the State does not enjoy the freedom of an owner" (*Northern Pacific Ry. Co.* v. *North Dakota,* 236 U. S. 585, 595).

Not only has the Court emphasized that in undertaking to *regulate* the interstate commerce of the carriers "in no proper sense is the public a general manager" of their business (*Interstate Commerce Commission* v. *Chicago G. W. Ry. Co.,* 209 U. S. 108, 119), but it has repeatedly prevented arbitrary or confiscatory action in respect of them under the commerce power. As stated by the Court in *Chicago, R. I. & P. Ry. Co.* v. *United States,* 284 U. S. 80, 97:

> "The use of railroad property is subject to public regulation, but a regulation which is so arbitrary and unreasonable as to become an infringement upon the right of ownership constitutes a violation of the due process of law clause of the Fifth Amendment."

Applying this rule in *United States* v. *C. M. St. P. & P. R. Co.,* 282 U. S. 311, 327, the Court held the Interstate

Commerce Commission without power to impound the funds established by private contract in a railroad reorganization for the payment of reorganization managers and protective committees, since it would amount to an infringement both of liberty of contract and of the right of property. In respect of the limitation of the Fifth Amendment upon the commerce power of the Federal Government in that case this Court said:

> "The power to regulate commerce is not absolute, but is subject to the limitations and guarantees of the Constitution, among which are those providing that private property shall not be taken for public use without just compensation and that no person shall be deprived of life, liberty or property without due process of law. *Monongahela Navigation Co.* v. *United States,* 148 U. S. 312, 336; *United States* v. *Joint Traffic Association,* 171 U. S. 505, 571-572; *Adair* v. *United States,* 208 U. S. 161, 180."

As recently as *Interstate Commerce Commission* v. *Oregon-Washington R. & N. Co.,* 288 U. S. 14, 41, where an order of the Commission requiring a railroad to build a line to highly unremunerative territory was held violative of the Fifth Amendment, the Court, after pointing out that the order required service which went beyond the undertaking of the carrier to the public, said: "The railroads, though dedicated to a public use, remain the private property of their owners, and their assets may not be taken without just compensation."

These principles clearly must also be applied in respect of the present novel attempt to regulate the coal business (assuming the Federal Government can regulate it at all, which we deny).

3. The statute and the Code have no real and substantial relation to the regulation of interstate commerce.

As previously pointed out, the real basis of this statute and of all the arguments in its support is an assertion of the power in the Congress under the Commerce Clause absolutely to control the movement of commodities across State lines by prohibitive or price fixing legislation, and to do so for any reason or for none (see Point V, *ante*). Since this position is indefensible and is the real basis of the statutes and of the arguments in its support, the whole statute must fall, without more.

If, however, the statute be assumed, *arguendo*, to be one directed to the removal of "burdens" and "restraints" from interstate commerce, and as not intended to transgress the limitations put upon the Federal power by the Fifth Amendment, it is equally bad under the cases cited in the preceding sub-section, which establish that it is a requirement of due process that the statute have a real and substantial relation to the regulation of interstate commerce. As previously pointed out (*ante*, pp. 6-9, 62, 103-112, 219-231) the record is barren of any evidence showing burdens, restraints or obstructions of interstate commerce, and the ultimate findings in this respect are erroneous in point of law.

The question of reasonable relation would, of course, be quite different if the Federal Government possessed and was here exercising a power to legislate for the *national* general welfare, similar to the broad general power which the States severally possess to legislate for the economic and social welfare of *their* citizens.[1] Were the Federal Government possessed of a power to regulate business and industry

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[1]Recent examples of the exercise of such broad general welfare power by the States include *Home Bldg. & Loan Assn.* v. *Blaisdell*, 290 U. S. 398, 428; *Nebbia* v. *New York*, 291 U. S. 502; and *Borden Farm Products Co.* v. *Ten Eyck* (decided February 10, 1936).

for the national general welfare as the States are empowered to regulate business and industry for local general welfare, the primary due process question here would be whether national conditions reasonably might be said to justify price control and the proration of markets in order to benefit particular producers and perhaps the industry as a whole, and whether the wage regulations were reasonably related to the general welfare of the nation as a whole through improvement of the economic and social welfare of the miners. But *national* general welfare, and *State* welfare, may be and sometimes are antithetical; and, whether so or not, the Federal Government possesses no such power but only the power to regulate commerce, the objects and scope of which have already been discussed herein (Point V, *ante*). This statute violates the Fifth Amendment because its regulations bear no real or substantial relation to the accomplishment of those objects.

It will be sufficient to demonstrate this in respect of the price and wage provisions, which are the heart of the scheme and without either of which the statute and Code must fall.[2]

Prices. But four bases for the price regulations may be discovered by close examination of the statute, the "findings" of the court below, and the arguments advanced by the Government. These are (a) that the Federal Government possesses the absolute power to prohibit the movement of commodities across State lines or to fix the price of commodities so moving; (b) that it may equalize prices between producing States and districts for the purpose of freezing or allocating competition and production; (c) that it may legislate to increase the earnings of coal operators, or

[2]See Points IV and VII *ante;* see *Schechter Corp.* v. *U. S.*, 295 U. S. 495, 548, 555.

some of them; and (d) that the price fixing provisions form a base for the wage fixing provisions. The discussion under the Commerce Clause (Point V and VI, *ante*) has disclosed that objects (a) (b) and (c) are not within the Federal power to accomplish under the Commerce Clause. The validity of object (d) must obviously depend upon the validity of the wage fixing regulations themselves.

Wages. The disclosed objects of the wage regulations establish that they also bear no real or substantial relation to the regulation of interstate commerce.

(a) The first excuse for the wage regulations is that the fixing of wages will prevent price differentials between the several producing States and districts and thereby prevent the shifting of markets and business between States and districts. This is but to urge that the commerce power includes authority to freeze or allocate markets or production, which, as already pointed out, it does not.

(b) The next argument is, in effect, that the wage fixing provision will foster a contented mind on the part of mine workers with the result that they will not strike and hence will not stop the shipment of coal in interstate commerce. On this explanation, the object of the wage provisions is not the regulation of interstate commerce but the improvement of the social welfare of the miner. A like contention, presented in *Retirement Board* v. *Alton R. Co.*, 295 U. S. 330, 368, in support of the pension plan for railroad workers there involved, was disposed of by the Court as follows:

> "The question at once presents itself whether the fostering of a contented mind on the part of an employee by legislation of this type, is in any just sense a regulation of interstate transportation.

> If that question be answered in the affirmative, obviously there is no limit to the field of so-called regulation. The catalogue of means and actions which might be imposed upon an employer in any business, tending to the satisfaction and comfort of his employees, seems endless. Provision for free medical attendance and nursing, for clothing, for food, for housing, for the education of children, and a hundred other matters, might with equal propriety be proposed as tending to relieve the employee of mental strain and worry. Can it fairly be said that the power of Congress to regulate interstate commerce extends to the prescription of any or all of these things? Is it not apparent that they are really and essentially related solely to the social welfare of the worker, and therefore remote from any regulation of commerce as such? We think the answer is plain. These matters obviously lie outside the orbit of Congressional power. The answer of the petitioners is that not all such means of promoting contentment have such a close relation to interstate commerce as pensions. This is in truth no answer, for we must deal with the principle involved and not the means adopted. If contentment of the employee were an object for the attainment of which the regulatory power could be exerted, the courts could not question the wisdom of methods adopted for its advancement."

What was there said has complete application to the argument now presented in support of the wage regulations of this statute as a means for preventing strikes and the resulting interruption and burdens upon interstate commerce. And in this case the relation of the regulation to interstate commerce is even more remote and unsubstantial, for if a regulation to foster a contented mind in railroad

workers, employed in operating instrumentalities of interstate commerce, has no real relation to the regulation of interstate commerce, *a fortiori,* a regulation to promote a contented mind upon the part of miners engaged in the local productive activity of mining coal has no such relation.

(c) The remaining argument for wage regulation comes merely to this,—that it tends to provide a more abundant life for the miners, in other words, that it is a provision for the economic and social betterment of the miners. The lack of any power upon the part of the Federal Government to regulate for the general welfare or for the welfare of particular classes has already been pointed out in previous discussion.

4. The statute and the code are arbitrary, capricious and confiscatory.

Limitations of time and space require that this discussion be restricted to a few of the more arrogant and obnoxious of the arbitrary, unreasonable and confiscatory provisions of this statute:

(a) *Confiscation.* The statute takes away from the the producer any control whatever over his labor costs, which are shown by the record to comprise 60% to 65% of his costs (FF. 64, R. 140). It also fixes minimum prices beyond his power to vary, and the record shows that these minima will in practice be the maxima in view of the overproduction and over-capacity in the industry (FF. 57-58, R. 137-138; R. 261-262; R. 388). The statute, therefore, regiments the producer into a rigid scheme for the distribution of markets and production, and utterly destroys his power of management over the most vital elements of his

business, to-wit, the prices which he shall charge his customers, the markets in which he may sell, and the amount of his principal item of costs. The functions left to the operator whose prices, markets, customers and wages are thus put beyond his control, are thereby reduced to little more than that of the actual mining of coal, and bookkeeping. The Congress would have exerted little more control if it had taken over his property and business by exercise of the power of eminent domain, but in that event it would have had to pay just compensation for it.

Here, although the statute is in form regulatory, it is in fact confiscatory. By controlling prices, markets, customers and wages, Carter Coal Company is deprived of any opportunity to earn a return upon the business skill or sagacity of its officers and directors, upon the economy and efficiency with which the business is operated, or upon the advantages due to natural conditions which advantages, in the absence of a showing to the contrary, must be assumed to have been an element in the price which it paid for its coal lands. The findings of the court below show that the coal lands of the Carter Coal Company are located in a region which has natural competitive advantages in respect of the accessibility and quality of its coals (FF. 18, R. 119; FF. 74, R. 145-146). The findings further show that its business has been increasing in recent years (FF. 36, R. 127), that it has a valuable goodwill, registered trade-names, customers and contracts, and that its goodwill and going-concern value are of substantial nature (FF. 37, 39, R. 127-128). It is also found that labor costs and prices are among the most important elements requiring business skill and judgment in the successful operation and management of a coal producing and selling corporation, and

that such matters represent an important function of the management of the Company (FF. 38, R. 127).

All this is wiped away by the present statute. This statute is not the exercise of a power to regulate, but of a power to confiscate and destroy, and is accordingly violative of the Fifth Amendment under the decisions of this Court discussed in subsection 2 *ante*.[1]

(b) *Arbitrary Power Given Competitors.* The findings show that there are 12 members of the district board in District No. 7 under this Act, which board has the duty of fixing prices for the coals of the Carter Coal Company; and that of these 12 members, 11 are either active competitors of the Carter Coal Company with mines in the same producing area, or are representatives of such competitors, and that the remaining member is a labor representative (FF. 10, R. 114-115). It is these men whom the statute directs and empowers to fix minimum prices for the coals of the Carter Coal Company and of other producers in that producing district, and the statute gives "full authority, in establishing such minimum prices, to make such classification of coals and price variations as to mines and consuming market areas as it [the district board] may deem necessary and proper".

It is pointed out elsewhere herein that the unlimited and unqualified power thus given to the district boards composed of competitors of the Company, with no statutory standard for a guide, is an unlawful delegation of legisla-

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[1] *Railroad Commission Cases,* 116 U. S. 307, 331; *Reagan* v. *Farmers Loan & Trust Co.,* 154 U. S. 362, 398; *Monongahela Navigation Co.* v. *U. S.,* 148 U. S. 312, 336; *Northern Pacific Ry. Co.* v. *North Dakota,* 236 U. S. 585, 595; *U. S.* v. *C. M. St. P. & P. R. Co.,* 282 U. S. 311, 327; *I. C. C.* v. *Oregon-Washington R. & N. Co.,* 288 U. S. 14, 39.

tive power (p. 236, *et seq.*). It needs no argument to disclose that such a delegation of authority to the competitors of a business is also arbitrary and unreasonable in the extreme. Possessed of this power under the broad wording of the statute just quoted, it would be possible, in the present competitive conditions in this industry as disclosed by the record, for the board to throttle the business of an individual producer by "classification of coals" and by "price variations as to mines and consuming markets", with no protection to the producer other than the right to appeal to the Commission and ultimately to the courts through a machinery which in practice could never provide timely and adequate relief and which would require him to sustain a burden of proof which in many cases it would be difficult if not impossible to satisfy, no matter how plain the discrimination in actual result.

(c) *Discrimination in Favor of Other Fuels.* By the present statute and the arguments in its support, we learn that the Federal Government: (*i*) undertakes price fixing of commodities; (*ii*) denies that it is exerting an absolute power; (*iii*) but does assume to destroy competition and reward for initiative in the business of producing and marketing that commodity; and (*iv*) does not propose to pay any compensation for the taking of the rights of property and liberty thereby involved.

If that can all be done, the Government must at least be prepared to show that it exercises that power equally and fairly—not by caprice, haphazard or according to whim. It must necessarily be prepared to show, in order to satisfy the requirements of due process, not merely that there is a public object in what it has done, but that it is

not discriminating as between competing commodities in exercising the power. Otherwise, there is nothing whatever left of the doctrine that the Fifth Amendment protects private property rights against arbitrary action.

How stands the present statute from this aspect? The record shows (R. 61-65, 326, 351, 369, 390), and the committee reports establish,[2] that the purpose and effect of this Act will be to raise the prices of bituminous coal. The record (FF. 53-55, R. 134-136; FF. 76, R. 146-147), and a prior decision of this Court[3] establish that coal is already losing markets to oil, natural gas and water power, and through greater efficiency of consumers in the use of coal. The inevitable result of this statute, therefore, will be the increased loss of business to coal producers.

It is hard to understand how it is proposed to justify an Act intended to eliminate competition in a particular commodity and to destroy many of the property rights of persons engaged in producing and selling that commodity, and profoundly to modify others, and to pay no compensation, and yet take no steps to preserve the markets of that commodity from competing commodities which are allowed to go unregulated. This is but another example of the injustice, the discrimination and, in short, the arbitrary

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[2]"It is generally conceded that this bill, if it should become the law (even for the short period which will necessarily elapse before it can be passed upon by the Supreme Court), will substantially raise the price of bituminous coal to the ultimate consumer, who has been given scant consideration in its preparation." (Minority Report, Ways and Means Committee House Report No. 1800, 74th Cong., 1st Sess., p. 48.) In a supplemental minority report by Congressman Knutson, it is stated: "The obvious intent of the bill is to raise the prices of bituminous coal" (*ib.*, p. 60).

[3]As the Court pointed out in *Appalachian Coals, Inc.* v. *United States*, 288 U. S. 344, 361: "Coal has been losing markets to oil, natural gas and water power and has also been losing ground due to greater efficiency in the use of coal."

character, of the power that is necessarily exercised when government forsakes the channels committed to its care by the Constitution and seeks to change our whole system (*cf. Borden's Farm Products Co.* v. *Ten Eyck,* decided February 10, 1936, pp. 5-6).

(d) *As Attempted to be Enforced, the Statutory Scheme is High-handed and Arbitrary.* The Code was promulgated on October 9, 1935 (R. 58). Under the terms of the statute it became obligatory upon coal producers either to accept that Code and comply with it on and after November 1, 1935, or to pay a pecuniary penalty greater than the net profits which any coal company makes (FF. 41, R. 128, R. 393, R. 366) and designedly high enough to drive dissenting producers out of business (FF. 41, R. 128-129).

The statute, therefore, required the operator to make a choice whether to subject himself to a ruinous pecuniary penalty which would drive him out of business, or, on the other hand, to submit to unconstitutional regulation which would be detrimental to his business (FF. 15, R. 117-118; FF. 169, R. 208). Not only would adherence to the Code be detrimental to the business of the operator but it would require him to cancel all his outstanding contracts, and further require him to enter a price fixing agreement with his competitors which would subject him and his associates in the operation of the business to the pecuniary and criminal penalties of the State and Federal anti-trust laws, if the Code and Act were unconstitutional.[4] Thus, if the

[4]Such a price fixing agreement would clearly be illegal under the anti-trust laws (*U. S.* v. *Trenton Potteries Co.,* 273 U. S. 392) and the crime would be complete upon the making of the agreement without consummation of the design or doing of a single overt act (*Nash* v. *United States,* 229 U. S. 373, 378; *United States* v. *Kissel,* 218 U. S. 601, 608).

Code and Act were unconstitutional, the operator by accepting the Code, would render himself liable to pay damages for breach of contract with his customers, and to criminal and financial penalties from the State and Federal governments. The statute would afford no protection to the Code members, for as said in *Norton* v. *Shelby County*, 118 U. S. 425, 442:

> "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed."[5]

The court below, although refusing a permanent injunction against the statute or the Code, has recognized these arbitrary features of the law, and, according the petitioner and his Company the elements of due process, as required by *Ex parte Young* and the many cases following it as listed in the margin,[6] has forever enjoined the collection of the penalties accrued up to the date of the decree in the court below. But the Government, pursuing the arbitrary intention either of the statute or of the Administration, has appealed to this Court from that part of the decree, and now demands that, if this statute should be

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[5]The provision relieving Code members from anti-trust acts, which might have afforded protection even if the rest of the statute were unconstitutional, was struck from the Guffey bill in the Senate (79 Cong. Rec. 14409, 74th Cong., 1st Sess).

[6]*Ex parte Young*, 209 U. S. 123, 147-148; *Oklahoma Operating Co.* v. *Love*, 252 U. S. 331, 336-337; *Chesepeake & Ohio Ry.* v. *Conley*, 230 U. S. 513, 521; *St. Louis, I. Mt. & So. Ry. Co.* v. *Williams*, 251 U. S. 63, 64-65; *Pacific Mail S. S. Co.* v. *Schmidt*, 241 U. S. 245, 250; *Missouri Pacific Ry.* v. *Tucker*, 230 U. S. 340, 349-350; *Wadley Southern Ry.* v. *Georgia*, 235 U. S. 651, 666.

determined to be constitutional in its regulatory features, the petitioner shall be penalized in the sum of $1,500 a day from November 1 last, for having dared to come to court to find out whether or not these novel and arbitrary provisions of this statute are within the power of the Government to impose upon him. This arbitrary feature in respect of enforcement is characteristic of the statutory scheme as a whole.

POINT X

IF EITHER THE LABOR OR THE PRICE FIXING PROVISIONS BE INVALID, PETITIONER IS ENTITLED TO INJUNCTIONS AS PRAYED, IRRESPECTIVE OF THE QUESTION OF SEPARABILITY.

Even if this Court should conclude that the trial court was correct in its rulings that (1) the regulatory provisions of the Act, other than those with respect to wages, hours and collective bargaining (*i.e.*, the labor provisions) are valid, (2) the labor provisions are invalid, and (3) the valid provisions are separable from the invalid; nevertheless, so much of the decree as dismisses the bill and refuses the injunctive relief requested, would still be erroneous. This would likewise be true if the price provisions were held invalid and all other provisions valid.

The petitioner is here in order that he be afforded protection against his Company's submitting to, or the officers of the Government enforcing, an invalid statute. If the statute is invalid in part only, he seeks, and is entitled to, protection with respect to that invalid part, and this even if, in order to afford petitioner such protection, it is necessary to grant him relief which in effect will forbid enforcement of the entire Act.

The specific relief requested by the petitioner is that his Company and the officers and directors thereof be perpetually enjoined from filing an acceptance of that particular Code which has been promulgated by the Bituminous Coal Commission (R. 14-15, 58-77); and that the defendant Government officers, their agents, assistants, deputies or employees, be perpetually enjoined from assessing or

collecting from said Company the penalty tax imposed by the Act, and from taking any other steps, legal or otherwise, to induce, coerce or compel said Company or its officers or directors to file an acceptance of said Code (R. 15-16).

Pursuant to the dictates of the statute (Sec. 4, Appendix, p. *7*, fol. 23), the Code which has been promulgated by the Commission, and which contains provisions both for regulation of prices (R. 61-70) and for regulation of labor relations (R. 70-71), has been formulated and prescribed as a "working *agreement*" (R. 58). The "drawback in the form of a credit" under Section 3 of the Act is allowed only to producers who have filed acceptance of the Code "in such form of *agreement* as the Commission may prescribe". (Act, Sec. 3, Appendix, p. *7*, fol. *22*). The form of Acceptance of Membership which has been prepared and supplied to coal producers (pursuant to Section 5(a) of the Act (Appendix, p. *25*, fol. 94)) states that the signing producer *"hereby accepts* the Bituminous Coal Code formulated and prescribed October 9, 1935 by the National Bituminous Coal Commission" (R. 76).

It is clear that if the petitioner's requests for relief are denied, and his petition is dismissed, his Company will be compelled, under the duress of the penalty tax imposed by Section 3, to file with the Commission an acceptance of the October 9, 1935 Code, which acceptance must be in the form prescribed by the Commission. An examination of such Form of Acceptance (R. 76-77) shows that it constitutes an unequivocal acceptance of the Code *in toto*, and, in fact, the Commission would not be qualified to prescribe a "form of agreement" not in substantially such form. Therefore, any acceptance of the Code in part, as, for instance,

of Parts I and II, but not Part III (with respect to labor relations) would not be an acceptance in the form prescribed by the Commission, and thus would not entitle a producer to a drawback upon the 15% tax. (Sec. 3, Appendix, pp. 6-7, fols. 20-21).

Since the Code is a "working *agreement*" (Act, Sec. 4, Appendix, p. 7, fol. 23; R. 58), any producer accepting it will thereby have *agreed* to abide by all of its provisions, including those for regulation of prices and those for regulation of labor relations. Should he not abide by any one of these provisions, therefore, he will thereby have violated an agreement, thus laying himself open to the penalties therefor, both those found in the statute, and those found outside the statute, as, for instance, in the law of contracts.

It is, of course, with respect to the particular Code which has been promulgated (*i.e.*, that formulated and prescribed October 9, 1935) that the petition for relief in this case is concerned. As stated above, *that* Code provides for *both* regulation of prices *and* regulation of labor relations in respect of those producers agreeing to it. It is difficult to understand, therefore, how this Court, if it should be constrained to rule *either* the regulation of labor relations *or* the regulation of prices pursuant to the Act to be invalid, could sustain the action of the court below in having dismissed the complaint. For it seems inevitably to follow that, if the complaint be dismissed, the petitioner will be completely without remedy because, as said before, his Company will then be forced to accept the Code and hence *agree* to subject itself to *the very regulation which has been ruled to be invalid.* Such a result would be most unjust and undesirable.

If the Code should be regarded as not creating a contractual relationship, it still remains as the embodiment of

regulations (including *all* those in Sec. 4 of the statute) which the Company must accept and with which it must comply in order to avoid the penalty tax, if the bill be allowed to stand dismissed (Act, Sec. 3, Appendix, pp. 6-7, fols. 18-22).

Courts do not operate directly upon statutes. They do not review and annul them on the ground that they are unconstitutional. Their power is one to adjudicate the rights of parties and, in doing so, to determine the law applicable to the controversy and to render judgment or decree accordingly, the unconstitutional statute notwithstanding (*Massachusetts* v. *Mellon,* 262 U. S. 447, 488). As pointed out in that case, "if a case for preventive relief be presented the court enjoins, in effect, not the execution of the statute, but the acts of the official, the statute notwithstanding" (p. 488).

The court below apparently felt that its *opinion* protected the petitioner and the Company from the enforcement of the provisions of the Act and of the Code found to be unconstitutional. Only upon such theory can dismissal of the bill be explained. The fallacy of this view is demonstrated by the case just cited and by consideration of the further fact that the theory of this suit, as of all suits to enjoin Government officers from enforcing a statute alleged to be unconstitutional, is that the officers, in their respective individual capacities, are perpetrating or threatening a trespass upon the rights of the plaintiff under color of a void law and, accordingly, should be enjoined.[1]

Application of the correct and settled theory, as exemplified in the cases cited, requires that injunctions issue as prayed, if either the labor or price fixing provisions of the Code be invalid, and this is so irrespective of the question of separability.

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[1] *Ex parte Young,* 209 U. S. 123; *Philadelphia Co.* v. *Stimson,* 223 U. S. 605, 619-620, and cases there collected.

POINT XI.

THE RIGHT TO EQUITABLE RELIEF IN THIS PROCEEDING IS CLEAR.

Petitioner is the owner of 50% of the common stock and of approximately 28% of the Class A preferred stock of respondent Carter Coal Company. Common and Class A preferred have equal voting rights, share for share (R. 629, 251).[1] Petitioner and every other shareholder and director of the Company believe that the Guffey Act is unconstitutional and economically unsound, that acceptance of and compliance with the Code by the Company would seriously damage it and might result in its bankruptcy, and that, on the other hand, defiance thereof would subject the Company to a pecuniary penalty which would ruin it financially and promptly drive it out of business. These facts are indisputable. They were pleaded and proved, and have been found by the court below (R. 7-9, FF. 15, R. 117-118; FF. 40-41, R. 128-129, R. 249-253, 259-261, 619-629).

The majority of the directors and of the shareholders refused petitioner's demand for resistance to the statute, being motivated solely by fear of the effect of the penalty tax. Petitioner did all in his power to protect his rights and those of the Company through corporate action and, when unsuccessful, elected to fight and brought this bill. These facts are indisputable, are proved by the evidence, and have been found by the court below (FF. 15, R. 117-118).

On these facts, the right of the petitioner to maintain this stockholder's bill, both in his own right and as a deriva-

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[1]All outstanding Class B common stock, which is non-voting, is held by the receiver of another coal company (R. 251). There is no other class of stock outstanding.

tive suit, and both against the Company and its officers and directors, and against the Government officials charged with enforcement of the statute, is established by an unbroken line of precedent in this Court.[2]

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[2]Suits against the corporation and officers and directors thereof: *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429; *Hyde* v. *Continental Trust Co.*, 157 U. S. 654; *Brushaber* v. *Union Pacific R. R. Co.*, 240 U. S. 1; *Stanton* v. *Baltic Mining Co.*, 240 U. S. 103; *Smith* v. *Kansas City Title Co.*, 255 U. S. 180.

Suits against both the corporation and the Government officers:

Hill v. *Wallace*, 259 U. S. 44
(holding the Future Trading Act of 1921 unconstitutional and enjoining the United States Collector of Internal Revenue and District Attorney from enforcing it);

Smyth v. *Ames*, 169 U. S. 466
(holding state rate making statute unconstitutional and establishing important principles of valuation and public utility law, and enjoining the railroad corporation defendants from complying with, and the Attorney General, Secretary of State, State Auditor, State Treasurer and Commissioner of Public Lands and Buildings from enforcing, an unconstitutional state statute);

Ex parte Young, 209 U. S. 123
(affirming an order committing the Attorney General of Minnesota for contempt for attempting to enforce an unconstitutional state law in violation of an injunction issued by the Federal court for the District of Minnesota in the case of *Shepard* v. *Northern Pacific Ry. Co.*, 184 Fed. 765, which latter case arose on a stockholder's bill to enjoin the corporation from obeying rate orders from a state regulatory commission and to enjoin the commission and the Attorney General from enforcing them);

Cotting v. *Kansas City Stock Yards Co.*, 183 U. S. 79 (holding unconstitutional a Kansas statute regulating stock yards and enjoining the corporation from complying therewith);*

Dodge v. *Woolsey*, 18 How. 331.
(holding state taxes unconstitutional in a stockholder's suit and enjoining the state tax collector from collecting them);

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*In this case, which was decided before the case of *Ex parte Young* (209 U. S. 123) had established that a suit against the Attorney General would not be a suit against the State, the Court found it unnecessary to issue an injunction against the Attorney General, and hence unnecessary to decide that question.

As shown by these cases, statutes which have "imposed a burden upon the corporation and penalties for failure to discharge it" (concurring opinion, *Ashwander* v. *Tennessee Valley Authority*, p. 7) have in the past proved adequate to coerce directors and majority shareholders into submission to unconstitutional statutes, to the detriment of the interests of the corporation and of minority shareholders therein.[3] As pointed out in *Ashwander* v.

Heisler v. *Thomas Colliery Co.*, 260 U. S. 245, 253
(sustaining jurisdiction in a stockholder's suit to enjoin a coal mining and distributing company from paying state taxes on coal when mined and ready for market and enjoining the Auditor and Treasurer of the State of Pennsylvania from enforcing this tax act, but holding that the tax was not a burden upon interstate commerce but only a tax upon mining coal and preparing it for market and therefore refusing injunctions);

City of Chicago v. *Mills*, 204 U. S. 321
(holding invalid a gas rate-making ordinance of the City of Chicago and enjoining the corporation and the City from enforcing it); and

Ashwander v. *Tennessee Valley Authority*
(sustaining jurisdiction on a preferred stockholder's bill to enjoin the corporation and the Government authority from performing an alleged illegal contract).

[3] The grounds given by directors or shareholders in previous cases, where they thought the statute unconstitutional but declined to fight, were of the following nature: "because they feared to antagonize the public officials whose duty it was to construe and enforce the act" (*Hill* v. *Wallace*, 259 U. S. 44, 61); or where the refusal is based upon "consideration of the many obstacles in the way of testing the law" (*Dodge* v. *Woolsey*, 18 How. 331, 340); or upon the ground that the assertion of the rights of the corporation "is accompanied with so many embarrassments that they decline to attempt it" (*Greenwood* v. *Freight Co.*, 105 U. S. 13, 15); or upon the ground that "failure to comply with the provisions of the income-tax law would subject the company to litigation with the United States, and the risk of incurring penalties, and of clouding the title of all the real estate held by it on its own behalf and in its fiduciary capacity"* (*Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429);

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*Quotation taken from resolution of board of directors of Farmers Loan & Trust Company, not set out in the opinion, but appearing in the record as Exhibit B to the Bill of Complaint in *Pollock* v. *Farmers' Loan & Trust Co.*

Tennessee Valley Authority (decided February 17, 1936), the fact of such coerced acquiescence "has not been deemed an adequate ground for denying to the stockholders an opportunity to contest the validity of the governmental requirements to which the directors were submitting" (p. 5).

In contrast with its position in *Ashwander* v. *Tennessee Valley Authority*, we do not understand that the Government is now asserting that the petitioner has no standing in this suit to challenge the validity of the Guffey Act. On the undisputed facts, on the findings of the court, and on the unbroken line of authority, we do not perceive how the standing of the petitioner in equity in this proceeding can well be challenged.

In deference, however, to the fears, recently expressed by the concurring Justices in the *Ashwander* case, that stockholders' bills may be made the means of evoking unnecessary decisions upon constitutional questions without proper showing of threatened injury or other ground of equitable jurisdiction, petitioner, out of abundance of caution, ventures to impose upon the Court's time to summarize the facts proven and found in this case which establish that this is no mere case of formal compliance with the technicalities of a mode of procedure, but that, on the

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or upon the ground that "this company does not feel at liberty to disregard [the Federal tax law provisions] and to incur thereby the heavy penalties which might result from this disregard"** (*Brushaber* v. *Union Pacific R. R. Co.*, 240 U. S. 1); or on the ground that they were submitting to the statute "not because they at any time believed said act to be valid * * *[but] solely by the fear of incurring a multitude of liabilities under the terms and conditions of the said act"*** (*Smyth* v. *Ames*, 169 U. S. 466).

**Quotation from Exhibit B to Bill of Complaint in record in *Brushaber* v. *Union Pacific R. R. Co.*

***Quotation from the answer of the defendant corporations appearing in the record in *Smyth* v. *Ames*.

contrary, equitable relief is imperatively required for the protection from destruction of rights of the most substantial character which are in immediate danger of ruin.

1. Business judgment.

No question of "business judgment"[1] is involved. The action voted by the directors and shareholders was taken solely under coercion of the ruinous pecuniary penalties imposed by the statute (FF. 15, R. 117-118, R. 8-9, 250, 620-629).

2. Petitioner's substantial pecuniary interest.

The petitioner is not, as in *Ashwander,* the holder of merely a small amount of preferred stock.[2] He is the holder of one-half the common stock and 28% of the preferred stock. In addition, he is the President and managing head of the business, and not only are his personal finances seriously involved, but his civil and criminal liabilities as President of this Company are directly involved, as will appear.

3. Ultra vires.

The laws of the State of Delaware require that the business of the respondent, Carter Coal Company, "shall be managed by a board of directors",[3] and, in conformity

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[1]Cf. concurring opinion of Mr. Justice Brandeis in *Hill* v. *Wallace*, 259 U. S. 44, 72-75.

[2]The concurring opinion in the *Ashwander* case points out that the plaintiffs there own less than 1% of the preferred stock and claimed to represent only about 1/9th of such stock.

[3]Laws of Delaware, 1929, Chap. 135, Sec. 4 (R. 5, 629, 630).

therewith, the By-laws of that Company provide that "The property, affairs and business of the corporation shall be managed by the Board of Directors".[1] The court below has found that:

> "38. Labor costs and prices are among the most important elements requiring business skill and judgment in the successful operation and management of a coal producing and selling corporation (R. 55). More than 60% of the production costs of Carter Coal Company are attributable to mine labor costs, and the right and duty to negotiate and contract with its miners in respect of the establishment of hours and wages is an important function of management of the Company" (R. 127).

This finding is supported by the extensive evidence in the record already referred to throughout this brief, disclosing the competitive situation in this industry.

It is clear that the surrender of control and management of the most vital elements of the business, *i.e.*, wages and prices, as required by the Code, is *ultra vires* the Company, its officers, and its directors. A long line of cases attests the rule that contracts which constitute attempts to deprive a board of directors of the exercise of their free judgment in the business of a corporation are *ultra vires*, illegal and void as against public policy.[2]

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[1]By-laws, Art. V, Sec. 1 (R. 5, 613).

[2]*Ames* v. *Goldfield Merger Mines Company*, 227 Fed. 292; *Manson* v. *Curtis*, 223 N. Y. 313; *Rosenthal* v. *Light*, 173 N. Y. Supp. 743; *Fensterer* v. *Pressure Lighting Company*, 149 N. Y. Supp. 49; *Hanssen* v. *Pusey & Jones Company*, 276 Fed. 296 (aff'd 279 Fed. 488; reversed on other grounds, 261 U. S. 491); *Metropolitan T. & T. Co.* v. *Domestic T. & T. Co.*, 44 N. J. Eq. 568, 14 Atl. 908; *Commercial Wood and Cement Co.* v. *Northampton Portland Cement Co.*, 190 N. Y. 1; *First Natl. Bank* v. *Commercial Travelers Assn.*, 95 N. Y. Supp. 454; aff'd 185 N. Y. 575.

This is also the rule in Delaware. Thus in *Hanssen* v. *Pusey & Jones Company*, 276 Fed. 296 (D. C. Del. 1921)[3] a Delaware corporation engaged in the building of ships had entered into a contract with United States Shipping Board Emergency Fleet Corporation, which provided, *inter alia*, that a nominee of the Emergency Fleet Corporation should hold the office of treasurer of the company. The Court ruled that such contract was *ultra vires* since it constituted "a practical nullification of the Delaware statute requiring that a Delaware corporation shall be managed by a board of directors."

In the court below the petitioner pleaded, as an independent ground of equity jurisdiction, that acquiescence in the Code would be *ultra vires* the Company, its officers and directors (R. 5, 7, 56). The evidence, findings, and authorities referred to above, establish this claim.

Equity jurisdiction of this suit exists, therefore, to enjoin threatened action which would be *ultra vires;* and the right to the relief prayed against the corporation and its officers and directors exists wholly irrespective of any showing of injury to the minority stockholder, or even as against the claim that the threatened action would be to his advantage and to the advantage of the corporation. The well settled rule is that where the minority stockholder sues to enjoin the corporation or its officers or directors upon the ground that the threatened action is *ultra vires,* no injury need be shown, and the right to equitable relief is established upon proof, without more, that the act is *ultra vires.*[4] The grounds and scope of this established

[3]Affirmed 279 Fed. 488, reversed on other grounds 261 U. S. 491.

[4]*Byrne* v. *Schuyler Electric Manufacturing Co.*, 65 Conn. 336; *Central R. R. Co.* v. *Collins*, 40 Ga. 582, 617; *Davis* v. *Congregation Beth Tephila Israel;* 40 App. Div. 424, 427; *Beman* v. *Rufford*, 1 Sim. N. S. 550; Fletcher, *Cyc. Corporations*, Sec. 5823, 5948.

doctrine are sufficiently indicated by the extracts printed in the margin from the cases of *Byrne* v. *Schuyler Electric Manufacturing Co.*,[5] *Central R. R. Co.* v. *Collins*;[6] *Davis* v.

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[5]65 Conn. 366. A minority stockholder brought a suit to enjoin the fulfillment of a contract alleged to be *ultra vires* his corporation, and to secure cancelation thereof (p. 344). The referee found that "the plaintiff failed to show that he was in any way injured by the transactions of which he complains, nor does it appear that he will be in any way benefitted if the relief that he seeks is granted him" (p. 353). The court, however, on consideration of this finding, ruled "it does not seem to this court that the question of the profitableness or unprofitableness of the transaction affects at all the plaintiff's right."

[6]40 Ga. 582, 617. A minority stockholder's suit to enjoin an *ultra vires* act. The court overruled the contention that the action would be advantageous to the stockholder, stating:

> "We do not think the profitableness of this contract, to the stockholders of the Central and Southwestern Railroad stockholders, has anything to do with the matter. These stockholders have a *right*, at their pleasure, to stand on their contract. If the charters do not give to these companies the *right* to go into this new exterprise [sic], any one stockholder has a right to object. He is not to be forced into an enterprise not included in the charter.
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> "That it will be to his interest is no excuse; that is for him to judge. By becoming a stockholder he has contracted that a majority of the stockholders shall manage the affairs of the company within its proper sphere as a corporation, but no further; and any attempt to use the funds, or pledge the credit of the company not within the legitimate scope of the charter, is a violation of the contract which the stockholders have made with each other, and of the *rights—the contract* rights—of any stockholder who chooses to say, 'I am not willing.' It may be that it will be to his advantage, but he may not think so, and he has a legal right to insist upon it that the company shall keep within the powers granted to it by the charter: 1 Shelford on Railways, 71; 1 My. & K., 162-3; 4 Y. & Coll., 618; 2 Dan. P. C., 521; 5 Hill, 386; 18 Barbour, 318; 43 N. Hamp., 525; 6 Angel & Ames on Corp., 4th edition, and cases cited."

Congregation Beth Tephila Israel;[7] *and Beman* v. *Rufford*.[8]

It thus appears that in the present case it was pleaded, proved and found that an independent ground of equity jurisdiction exists, entitling the petitioner as a matter of law to enjoin the doing of an *ultra vires* act by the corporation and its officers and directors under coercion of an unconstitutional statute, and that this right exists wholly irrespective of any question of injury, either to the peti-

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[7]40 App. Div. 424, 426-427. A member of a religious corporation sued to set aside an *ultra vires* contract. The court said:

> "It is argued that the congregation of which the plaintiff was a member acquired all the property of the other, and hence that he was in no way prejudiced. This is no answer to the plaintiff's complaint. He has a right to keep the corporation of which he is a member within its chartered powers. And the *ultra vires* act cannot be defended by the pretense that it is advantageous. (*Tomkinson* v. *Southeastern Railway Company*, 35 Ch. Div. 677; *Mills* v. *Central Railroad Company*, 41 N. J. Eq. 1, 12, 13.)"

[8]1 Sim. N. S. 550. In granting an injunction in a suit by minority shareholders of a railway to restrain enforcement of their corporation's *ultra vires* agreement with another railroad company, Baron Cranworth said:

> "The bill, however, is filed by the shareholders of the *Oxford, Worcester and Wolverhampton Railway Company*, and the principle on which they are entitled to file it on behalf of themselves and all the other shareholders, is that this Court will not allow any of them to say that they are not interested in preventing the law of their Company from being violated. It will not allow any of them to speculate as to whether it would be more advantageous to do something which the Act of Parliament does not authorize to be done; and therefore it is that a very small number or, indeed, one of the shareholders may file a bill on behalf of the whole body, although, at a meeting of the Company, a large majority of the other shareholders may have sanctioned that course of proceeding which the bill complains of. The shareholders so filing this bill, say that the Company, together with the directors of it, have entered into a contract, * * * different from that which was contemplated by the Act of Parliament, and so to apply funds, which the plaintiffs say are their funds, in a mode in which they were never authorized to be applied; and, therefore, the plaintiffs seek to restrain them."

tioner or to the corporation. In this aspect, again, the case is a much stronger one than *Ashwander*. In that case the concurring opinion states: "Nor is there any basis in law for the assertion that the contract was *ultra vires* the Company" (pamphlet print p. 2).

Moreover, as in *Hill* v. *Wallace*, which, like this case, was both a suit to enjoin the corporation and its directors from complying with the regulatory features of the statute and to enjoin Federal officers from enforcing the penalty tax, the right to relief against the corporation and its directors exists independently of the right to injunction against the Federal officers, and the court would be required to determine the issue raised as between petitioner and the company and its directors even though impediments should be found to the granting of an injunction against the Federal officers. The precise point was considered and ruled upon in *Hill* v. *Wallace*, 259 U. S. 44, at 62, 63.

4. Injury from joining Code—loss of liberty.

The discussion under succeeding headings will disclose that acceptance of the Code will result in serious financial injury both to the Company and to the petitioner. However, there is still another ground of equity jurisdiction which does not require proof of financial injury. As pointed out in *Allgeyer* v. *Louisiana*, 165 U. S. 578, 589, and other cases discussed in Point IX *ante*, the liberty guaranteed by the Fifth Amendment is not confined to physical liberty of the person but also comprises freedom to pursue any lawful occupation in a lawful manner. If the regulatory scheme of this statute is unconstitutional it clearly infringes the liberty thus guaranteed, and it would be wholly

untenable to say that the citizen cannot enjoin its enforcement without proving that that would result in financial injury to him.

The rule that the Court will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation,[1] plainly does not require proof of financial injury where the suit is one to protect that fundamental right of liberty.

If a citizen were deprived of physical liberty, as by incarceration under an unconstitutional statute, plainly no court of justice would accept the view that he had no standing in court for failure to show that the imprisonment would not better him financially and physically. If the constitutional guarantee of liberty is to mean anything more than liberty from illegal imprisonment, the argument requiring proof of financial injury must also be rejected where the statute infringes the liberty of the citizen to live and work as he will and earn his living in any lawful calling, unconstrained by the regimentation of an unconstitutional Code.

The Constitution gives the Federal Government no authority to regulate the breadwinning activities of the people upon the claim or showing, without more, that the regulation will result in financial benefit to them. If the Federal Government is to remain a government of limited powers, as it was created, the citizen must continue to have the right to enjoin unauthorized regulation of his trade or business by the Federal Government whether it puts money in his pocket or takes it out. Of course, the present record shows that the Code will not only be financially injurious to the Company and to the petitioner, but may

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[1] *Tyler* v. *Judges, etc.*, 179 U. S. 405; *Hendrick* v. *Maryland*, 235 U. S. 610, 621.

be ruinous. Upon principle, however, that showing is unnecessary. A greater issue is at stake. In the protection of constitutional liberty it has always been the rule of this Court that the right to *acquire* property by honest labor or the conduct of a lawful business is as much entitled to protection as the right to guard property already acquired.[2] If that right is to continue to mean anything it must be accorded protection from unconstitutional regimentation, irrespective of any financial issue.

5. Injury from joining Code. Breach of contract.

No injury is plainer or more certain to accrue to the corporation from joining the Code than the liability to which it would be subjected for breach of its existing contracts for the sale and delivery of coal. The statute and the Code expressly provide that outstanding contracts shall be breached in order to comply with Code prices, with certain exceptions, and also forbid the making, after the date of enactment of the Act, of contracts which provide for delivery for a longer period than thirty days from date of the contract (Act, Sec. 4, Part II(e); Sec 12; Code, Part II, Sec. 8, R. 66). The Carter Coal Company has outstanding long term contracts entered into prior to the enactment of the Act for 850,750 net tons at an aggregate price f. o. b. mines of $1,004,765 which are not within any of the exceptions of the sections of the statute just referred to (FF. 39, R. 127; FF. 169, R. 208), and if it joins the Code it will of necessity be compelled to breach some at least of these contracts (R. 54), in view of the avowed purpose and

[2] *International News Service* v. *Associated Press*, 248 U. S. 215, 236, 237; *Truax* v. *Raich*, 239 U. S. 33, 37-38.

effect of this statute to increase coal prices (R. 326, 351, 369, 390). If the statute is unconstitutional the Company's contractees will be entitled to substantial damages. It also has entered into long term contracts since the enactment of the Act for 230,000 net tons, which it will automatically be required to breach on joining the Code (FF. 39, R. 129, FF. 169, R. 208).

Of course, the unconstitutional statute will be no protection in a suit to recover damages (*Norton* v. *Shelby County,* 118 U. S. 425, 442). Upon consideration of these facts the court below found as an ultimate finding "Should the Carter Coal Company join the Code, it would be compelled to cancel existing contracts * * *." (FF. 169, R. 208).

6. Injury from joining Code—liability for anti-trust law violation.

By joining the Code, the Company and its officers and directors become parties to a combination and agreement between competitors in the coal business who agreed to get together for the purpose of fixing and maintaining prices. Such a contract, agreement or combination is in restraint of trade, whether the prices fixed are reasonable or not; and, to the extent that it is operative in intrastate commerce it is violative of the anti-trust laws of the several States, and is violative of the anti-trust laws of the United States to the extent that it is operative in interstate commerce. (*United States* v. *Trenton Potteries, 273* U. S. 392). The mere formation of the agreement or combination, without any proof of overt act or of consummation of the price fixing arrangement, is illegal (*Nash* v. *United States,* 229 U. S. 373, 378; *United States* v. *Kissel,* 218 U. S. 601, 608).

If the Guffey Act is unconstitutional it will afford no protection against civil or criminal proceedings under these anti-trust laws (*Norton* v. *Shelby County, supra*). Even an express provision in this unconstitutional statute purporting to exempt Code members from the provisions of anti-trust laws could not operate to exempt them from provisions of the *State* anti-trust laws, and in any event, the Guffey Act contains no such exemption, even the provision exempting Code members from the Federal anti-trust laws, which appeared in the bill when it passed the House, having been struck from the statute on the Senate floor.[1]

This liability under the anti-trust laws is not merely a threat to the Company itself, but is a threat to the petitioner in his capacity as President and director, for upon the Company's joining the Code he must either resign his position as President and Director, and lose the emoluments that go therewith, or be jointly liable with the Company, criminally as well as civilly, for any acts done under the Code which constitute "in whole or in part" a violation of the anti-trust acts.[2]

Even if it should be assumed that the Code imposes no contractual obligations, the anti-trust laws would be vio-

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[1]79 Cong. Rec. 14409, 74th Cong., First Sess.

[2]Clayton Act, § 14, 38 Stat. 736 (15 U. S. C. A. § 24), reading as follows: "*Liability of directors and agents of corporation.* Whenever a corporation shall violate any of the penal provisions of the antitrust laws, such violation shall be deemed to be also that of the individual directors, officers, or agents of such corporation who shall have authorized, ordered, or done any of the acts constituting in whole or in part such violation, and such violation shall be deemed a misdemeanor, and upon conviction therefor of any such director, officer, or agent he shall be punished by a fine of not exceeding $5,000 or by imprisonment for not exceeding one year, or by both, in the discretion of the court."

lated, for they apply not merely to contracts, but also to combinations, as well as to conspiracies.[3]

Nor is it fruitful to speculate whether this Court in some future case may find some ground upon which to relieve persons who join this Code in good faith from prosecution under the anti-trust laws of the United States or of the several States, should the statute and Code be declared unconstitutional. No authority in the books at present establishes the right to such immunity, and the statute does not purport to confer it. The threat not merely of pecuniary liability from joining the Code, but of criminal conviction and imprisonment as well, is existent and very real.

7. Injury from joining Code—loss of business.

As already pointed out, the committee reports show that the purpose of this Act is to increase the price of bituminous coal, and the record shows that its effect will be to increase it (R. 260-265, 326, 351, 369, 390). Previous discussion has also established the injury which will thereby accrue through loss of business to competing fuels and through economies of consumers in the use of coal. (See FF. 53-55, R. 134-136.) Injury through the fixing of minimum prices which will in practice be the maximum prices and which the statute directs be made with no allowance for profit, is also very clear and very real. Injury through discrimination in classification of coals by a board of competitors upon which petitioner's company is not represented, has also been discussed. The record abounds in facts show-

[3]Sherman Act, Secs. 1, 2 (26 Stat. 209).

ing substantial grounds for apprehension of business loss and financial injury through joining the Code.

8. Injury from joining Code—disclosure of contracts and prices to competitors.

The statute and Code require Code members to report *all* orders to the district board and to file copies of *all* contracts, invoices, credit memoranda, etc. with that board (Act, Sec. 4, Part II(a)). In thus requiring that all such matters be disclosed, whether they relate to interstate or intrastate business, the statute clearly exceeds the power of the Congress under the Commerce Clause and is in patent violation of the Fourth Amendment. The opinion of this Court in *Federal Trade Commission* v. *American Tobacco Co.*, 264 U. S. 298, 305, 306, might have been written with this very section of the present statute in mind. In that case, in holding invalid an order of the Commission requiring the company "to produce its records, contracts, memoranda and correspondence" for inspection of the Commission in connection with a supposed violation of the anti-trust laws, the Court said:

> "The mere facts of carrying on a commerce not confined within state lines and of being organized as a corporation do not make men's affairs public, as those of a railroad company now may be. *Smith* v. *Interstate Commerce Commission*, 245 U. S. 33, 43. Anyone who respects the spirit as well as the letter of the Fourth Amendment would be loath to believe that Congress intended to authorize one of its subordinate agencies to sweep all our traditions into the fire (*Interstate Commerce Commission* v. *Brimson*, 154 U. S. 447, 479), and to direct fishing expeditions into private papers on the possi-

bility that they may disclose evidence of crime. We do not discuss the question whether it could do so if it tried, as nothing short of the most explicit language would induce us to attribute to Congress that intent. The interruption of business, the possible revelation of trade secrets, and the expense that compliance with the Commission's wholesale demand would cause are the least considerations. It is contrary to the first principles of justice to allow a search through all the respondents' records, relevant or irrelevant, in the hope that something will turn up."

And again at page 307:

"The demand was not only general but extended to the records and correspondence concerning business done wholly within the State. This is made a distinct ground of objection. We assume for present purposes that even some part of the presumably large mass of papers relating only to intrastate business may be so connected with charges of unfair competition in interstate matters as to be relevant, *Stafford* v. *Wallace*, 258 U. S. 495, 520, 521, but that possibility does not warrant a demand for the whole."

It is true that the present statute states that "All such records shall be held by the district board as the confidential records of the Code member filing such information", but this pious statement does not alter the fact that every member of that board is an active competitor of the petitoner's Company. The fact that the right of privacy in business records and papers is of substantial financial value, is attested by the substantial judgments which have

been obtained for unlawful governmental violation of such right.[1]

9. Injury from joining Code—liability for Code expense.

The statute provides that Code members shall pay their proportionate share of the expense of administering the Code (Act, Sec. 4, Part I(b)). The court found that if the Company joins the Code, it "would be compelled to pay its proportionate share of administering the Code" (FF. 169, R. 208). The record shows that the Carter Coal Company was forced to pay $20,000 for its proportionate share of administering the Bituminous Coal Code against it under the N. R. A. during the twenty months of the existence of that Code (R. 260). Such an item is no inconsiderable one in a business whose net last year was less than $325,000 (FF. 35, R. 126). This item "would add to the cost of producing coal by the Corporation" and was "a material consideration" affecting petitioner's opposition to the Code (R. 260).

10. Injury through exaction of penalty.

In view of all of the foregoing facts, there can be no serious contention that acceptance of the Code by the Company does not constitute a most serious threat to the constitutional and property rights of the petitioner and of his Company alike. The facts clearly sustain the trial court's ultimate finding that "plaintiff had reasonable ground to contest the regulatory provisions of the statute" (FF. 168, R. 208).

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[1]See *In re Pacific Ry. Comm.*, 33 Fed. 241, 253.

Irreparable injury through exaction of the penalty tax is also clear. As previously pointed out, the undisputed evidence shows, and the court below found, that the amount of penalty tax is substantially in excess of the net profits of the Company and that the exaction of it from respondent Company, while its competitors are relieved of the penalty, would promptly drive the Company out of business (FF. 40-41, R. 128-129). There is no dispute in the evidence upon this point.

11. Lack of remedy at law.

Obviously, the petitioner has no remedy *at all* in a court of law to prevent the Company and its officers and directors from assenting to the Code and causing the Company to become a member thereof. There has been no suggestion throughout the whole course of this litigation that this petitioner has any other remedy whatever to prevent that, other than in a court of equity and in this proceeding. The court below properly found that there was no other remedy (Conclusion 3, R. 213).

If the petitioner is entitled to an injunction preventing the Company from joining the Code, the further right to enjoin the assessment of the penalty tax against it is established by precedent[1] and by the special facts proved and found in this case. Should the Company be enjoined from accepting and complying with the Code and yet left open to the assessment and collection of the penalty tax, it would

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[1] *Hill* v. *Wallace*, 259 U. S. 44; *Dodge* v. *Woolsey*, 18 How. 331. See *Heisler* v. *Thomas Colliery Co.*, 260 U. S. 245, 253; *Smyth* v. *Ames*, 169 U. S. 466; *Ex parte Young*, 209 U. S. 123; *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429; *Brushaber* v. *Union Pac. R. R.*, 240 U. S. 1.

be financially ruined and driven out of business long before it could satisfy the lengthy statutory procedure respecting claims for refund and suit at law to recover the illegal exaction.[2]

The court below, appreciating these facts (FF. 40, 41, R. 128, 129), concluded not merely that petitioner was without any remedy at law in respect of his suit against the Company and its officers and directors (Conclusion 3, R. 213), but that R. S. 3224 is not a bar to the relief which he prays against the Government officer respondents (Conclusion 5, R. 213), and that he has established a standing in equity entitling him to the relief prayed in his bill, if his constitutional objections to the Code be sound (Conclusion 4, R. 213). As respects the right to equitable relief against the exaction of the penalty tax, this conclusion is clearly sound, whether the exaction be regarded as a true tax[3] or as a penalty to enforce compliance with a course of conduct.[4]

CONCLUSION

It is submitted that so much of the decree as dismisses the bill of your petitioner should be reversed, and that the cause should be remanded to the court below with directions to grant the relief as prayed in the bill.

Respectfully submitted,

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[2] R. S. 3226, as amended, (47 Stat. 169), 26 U. S. C. 1672-1673.
[3] *Miller* v. *Standard Nut Margarine Co.*, 284 U. S. 498.
[4] *Hill* v. *Wallace*, 259 U. S. 44, 62, (See *Graham* v. *Du Pont*, 262 U. S. 234, 258); *Lipke* v. *Lederer*, 259 U. S. 557; *Regal Drug Co.* v. *Wardell*, 260 U. S. 386.